

RULES ENABLING ACT OF 1985

HEARING
BEFORE THE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-NINTH CONGRESS
FIRST SESSION
ON
H.R. 2633 and H.R. 3550
RULES ENABLING ACT OF 1985

JUNE 6, 1985

Serial No. 15



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1985

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RULES ENABLING ACT OF 1985

THURSDAY, JUNE 6, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met at 2:12 p.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Hyde, Kindness and Swindall.

Staff present: David W. Beier, counsel; Joseph Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The subcommittee will come to order.

This afternoon the subcommittee will conduct hearings on the Rules Enabling Act, H.R. 2633. Last Congress we held hearings on H.R. 4144, the bill to reform the Rules Enabling Act process. The subcommittee marked up that bill and ordered a clean bill reported favorably to the full committee but did not pursue the legislation further.

The purpose of this afternoon's hearing is to examine the new bill, H.R. 2633. This bill very similar to the final bill processed last session, except for one major respect: This bill provides no supersession provision. Instead, H.R. 2633 provides that the Supreme Court can no longer prescribe general rules of practice and procedure that abridge, enlarge or modify any substantive right or supercede any provision of the U.S. law. Under current law general rules of practice and procedure promulgated by the Supreme Court supercede all laws in conflict with such rules.

Today the subcommittee will hear from two distinguished witnesses, Prof. Stephen Burbank, associate professor and associate dean, University of Pennsylvania Law School, and Prof. Paul Rothstein, chairperson, ABA Criminal Justice Section's Committee on Rules of Procedure and Evidence. Today's hearing will focus on the process by which the Federal judiciary and the Congress promulgate Federal rules of practice and procedure.

Under current Federal law, as well as under the proposed bill, rules developed by the judiciary will have the full force and effect of law. Existing rules govern class action determinations, set the prerequisites for the issuance of injunctions and other procedural matters that vitally affect the property and rights of citizens. Thus, there is little question that these procedural rules are important.

If I may, I would like to call both witnesses forward. We have only two witnesses today. The testimony may not be precisely the same, but presumably it is not antagonistic.

So, I would like to greet both Prof. Stephen Burbank, as well as Prof. Paul Rothstein.

I call upon Professor Burbank to proceed. We have a copy of your statement, and you may proceed as you wish.

TESTIMONY OF STEPHEN B. BURBANK, ASSOCIATE PROFESSOR AND ASSOCIATE DEAN, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, AND PAUL ROTHSTEIN, PROFESSOR, CHAIRMAN OF THE RULES COMMITTEE, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION

Mr. BURBANK. Thank you very much, Mr. Chairman.

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to testify on H.R. 2633, the Rules Enabling Act of 1985. There is now general recognition that court rules can have a dramatic effect on the outcome of litigation and hence on rights recognized by the substantive law. Increasingly in recent years, commentators have criticized the structure and process of Federal court rulemaking, both supervisory and local, as well as the standards used in determining the validity of Federal court rules. During the same period, Congress has prevented a number of supervisory rules and amendments prescribed by the Supreme Court from taking effect, and on other occasions it has come close to taking that action. This hearing and the hearings held in previous sessions should provide a basis for an informed decision by Congress whether, after some 50 years with the modern enabling acts, the existing system can be improved. I believe that it can and that this effort is well worth Congress' attention, if only to diminish congressional involvement in Federal court rulemaking in the future.

The most important issue raised by H.R. 2633, when compared with the antecedent bills introduced by the chairman on this subject, concerns the relationship between supervisory rules prescribed by the Supreme Court and existing acts of Congress. Currently, most valid supervisory rules supersede previously enacted statutes with which they are in conflict. Proposed section 2072(b) includes a provision that supervisory rules not supersede any provision of a law of the United States. The proposed change is an important one, and it deserves close attention.

When the first bill to give the Supreme Court supervisory rule-making power in actions at law was being considered in 1914, a provision for superseding effect was deemed important because of the large number of Federal statutes that regulated practice and procedure in the Federal courts and the difficulty of identifying those to be superseded, at least before the rules authorized were promulgated. In addition, there was concern that a provision requiring consistency, quote, "with any law of the United States," end quote, such as governed the Court's power to promulgate equity rules, would engender confusion or controversy as to the status of the Conformity Act. On the other side, there were doubts about the constitutionality of a supersession provision, doubts that

were met with the argument that Congress could, itself, repeal undesignated statutes in futuro by such a provision.

The circumstances that brought forth this sort of provision in the Federal system have changed. The 1948 revision of the Judicial Code saw the express repeal of many statutory provisions touching practice and procedure including, of course, the Conformity Act. Moreover, Congress is aware of and legislates against the background of the Federal Rules of Civil Procedure and other supervisory court rules. Indeed, an argument can be made that Congress too rarely adverts to the possible need for specialized procedure—as opposed to what we call the trans-substantive procedure of Federal rules—when it enacts legislation. To the extent that acts of Congress do contain provisions that are inconsistent with proposed rules or amendments, it should be possible for the rulemakers, in cooperation with, for instance, the Congressional Research Service, to identify those provisions and to recommend that Congress repeal them. This, I take it, is one of the purposes behind the last sentence of proposed section 2074(a) of the bill.

If, under the existing system, conflicts have rarely arisen between acts of Congress and subsequently prescribed supervisory rules, as some maintain, will not such conflicts be rarer still when the rulemakers are charged to avoid them or to recommend repeal of the offending statutes? And as to any residual unintended conflict, which could be the subject of litigation, it may fairly be asked how the costs and benefits of the proposed system, no superseding effect, compare with the comparable net for the present system.

One cost entailed by the present system, by the supersession provision in 28 U.S.C. section 2072, has become evident in recent years. The amendment to rule 83, which was just promulgated by the Supreme Court and which will become effective on August 1, unless Congress intervenes, continues to require, in terms at least, consistency only with the Federal Rules of Civil Procedure and not with statutes in contravention of 28 U.S.C. section 2071. In addition, the Advisory Committee has twice proposed amendments to rule 68 of the Federal Rules of Civil Procedure that many people, including apparently Representative Kastenmeier, believe are inconsistent with acts of Congress. The sobering fact is that, if rules or amendments promulgated by the Supreme Court are not blocked by Congress, and if they are found valid under the Enabling Act—and none has ever been found invalid—they prevail in any conflict with existing acts of Congress. Because Congress must consider that possibility in reviewing proposed rules, one cost of the present system is to put additional pressure on Congress to step in.

The legal climate has also changed since 1914 or 1934. The Supreme Court's decision in the *Chadha* case has drawn again in question whether provisions for superseding effect are in fact constitutional. After all, on one view, they purport to authorize the repeal of a Federal statute, a legislative act, by a process other than that prescribed by article I of the Constitution.

Can the repeal fairly be attributed to Congress, in the Enabling Act, when that which is to be repealed is unknown, and, indeed, unknowable, at the time the Congress acts?

I am not at all sure of the answer, but perhaps such difficult questions should be avoided. In my view, the burden should be

placed on the rulemakers to demonstrate that the benefits of a provision for superseding effect outweigh the costs of such a provision. I doubt that the case can any longer be made. Moreover, even if it can, difficult constitutional questions remain to be answered before Congress perpetuates the current system.

I applaud the provision in proposed section 2074(a) requiring the Supreme Court to:

Transmit with such proposed rule proposed amendments to any law, to the extent such amendments are necessary to implement such proposed rule or would otherwise promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.

I believe, however, that proposed section 2073(a)(1) should be revised so as to make that provision fully effective.

This bill contains a number of safeguards against rulemaking proposals that are ill-considered or ultra vires, and it should, therefore, help to get Congress out of the business of regularly reviewing supervisory Court rules on the merits. I continue to doubt, however, that all the procedural safeguards in the world will prevent controversy where it counts, namely in Congress, because the rulemakers' reaction to controversy in the lawmaking process will necessarily continue to be ad hoc. For that reason, I have previously recommended that the Judicial Conference consider the formulation of standards or guidelines delineating the proper spheres of activity of its Rules Committees. Professor Remington has made a similar recommendation. To ensure that this happens, proposed section 2073(a)(1) should require the conference to prescribe and publish not only the procedures for the consideration of proposed rules under this section but also standards or guidelines for the exercise of the power conferred by section 2071 of this title.

In my prepared statement, I note the overlap and potential inconsistency between the statutory amendments proposed in section 4(a) and the recently promulgated amendment to rule 83. Passing that, it is not clear to me why notice and comment rulemaking should not be required of all courts established by act of Congress, which is, of course, the scope of 28 U.S.C. section 2071. Certainly, the perceived problems with local court rulemaking have not been confined to the district courts. I expect that some individuals are opposed to a notice and comment procedure for any local court rulemaking. But the rulemakers themselves have imposed that requirement on district courts in the recently promulgated amendment to rule 83. Apart from the Supreme Court, I am not aware of material differences among courts covered by section 2071 that make notice and comment rulemaking appropriate for some but not for others. The procedure may be somewhat more complicated logistically for courts of appeals and the specialized courts, but that hardly seems adequate reason to exempt them.

I recognize the delicacy of prescribing rulemaking procedures for the Supreme Court and would suggest exempting it as has been done in the amendment to 28 U.S.C. section 2077(b) proposed in section 2—which amendment, by the way, I favor. In light, however, of experience indicating that the Supreme Court could benefit from advice with respect to its own rules, Congress should urge the Court, in my view, voluntarily to follow rulemaking procedures required of other courts.

Finally, in connection with any amendment to section 2071, I ask you to consider language that would permit a court to act in an emergency.

The amendment to section 332 proposed in section 4(a)(2) of the bill, confers power on judicial councils to modify or abrogate only local rules found inconsistent with rules prescribed under section 2072 of this title. But the amendment to rule 83 recently promulgated by the Supreme Court contemplates a much broader power in the judicial councils. Here again, it seems to me there is room for mischief as a result of lawmaking processes that are proceeding in tandem. In any event, the conflict sets in relief the question whether the councils' power to abrogate local rules should be confined as it is in H.R. 2633.

In my prepared statement, I set forth some of the arguments in favor of a broad power of review in the councils as well as some of the arguments against such broad power. In my view, it is important for Congress to be aware of these conflicting views and for Congress to settle what the scope of the councils' power with respect to district court rules should be.

In conclusion, I wish to commend you, Mr. Chairman, and the members of the subcommittee, for the attention you are devoting to this important subject. Law reformers have long assured us that procedure is technical, details, in short, adjective law. The controversy surrounding the Civil Rules Advisory Committee's proposals to amend rule 68 is only the latest reminder that it is not so. Whatever differences I may have with you on some of the provisions of H.R. 2633, I believe that it represents a real advance, and hope, therefore, that it will receive prompt consideration by Congress.

Thank you.

Mr. KASTENMEIER. Thank you very much for that statement. Of course, your statement in its entirety, together with the appendixes, will be made part of the record.

[The statement of Professor Burbank follows:]

PREPARED STATEMENT

OF

STEPHEN B. BURBANK
ASSOCIATE PROFESSOR AND ASSOCIATE DEAN
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND
THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ON

H.R. 2633 (THE RULES ENABLING ACT OF 1985)

JUNE 6, 1985

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to testify on H.R. 2633, the Rules Enabling Act of 1985. There is now general recognition that court rules can have a dramatic effect on the outcome of litigation and hence on rights recognized by the substantive law. Increasingly in recent years, commentators have criticized the structure and process of federal court rulemaking, both supervisory and local, as well as the standards used in determining the validity of federal court rules.¹ During the same period, Congress has prevented a number of supervisory rules and amendments prescribed by the Supreme Court from taking effect, and on other occasions it has come close to taking that action. This hearing and the hearings held in previous sessions² should provide a basis for an informed decision by Congress whether, after some fifty years with the modern enabling acts, the existing system can be improved. I believe that it can and that this effort is well worth Congress' attention, if only to diminish congressional involvement in federal court rulemaking in the future.

My interest in the subject of federal court rulemaking derives from teaching and research and has been enhanced by practical experience in a closely allied area. In 1982, I published a study of the history of the Rules Enabling Act of 1934 (codified at 28 U.S.C. § 2072) and of the work of the original Advisory Committee appointed by the Supreme Court to draft the Federal Rules of Civil Procedure.³ Since that time, I have commented on proposed amendments to the Civil Rules, both in the literature⁴ and in a

communication to the Advisory Committee.⁵ I have also served as reporter to the Third Circuit Judicial Council for procedural rules to implement the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, work that led me to publish studies of procedural rulemaking under that Act.⁶ In my testimony today, I will avoid, as much as possible, repeating what I have said about previous bills to amend the enabling acts.⁷ Thus, for instance, although I continue to doubt the wisdom of requiring the rulemakers to meet in public, that view is already reflected in the hearing record,⁸ and I assume that the Subcommittee holds the contrary view.

Section 2. Rules Enabling Act Amendments

1. The most important issue raised by H.R. 2633, when compared with the antecedent bills introduced by the Chairman on this subject, concerns the relationship between supervisory rules prescribed by the Supreme Court and existing Acts of Congress. Currently, most valid supervisory rules supersede previously enacted statutes with which they are in conflict.⁹ Proposed § 2072(b) includes a provision that supervisory rules not "supersede any provision of a law of the United States." The proposed change is an important one, and it deserves close attention.

The provision for superseding effect in the enabling acts traces its origins to hearings on the first bill in the long campaign by the American Bar Association to secure for the Supreme Court supervisory rulemaking power in actions at law.¹⁰ Briefly, a provision of that sort was deemed important because of the large

number of federal statutes that regulated practice and procedure in the federal courts and the difficulty of identifying those to be superseded, at least before the rules authorized were promulgated. In addition, there was concern that a provision requiring consistency "with any law of the United States," such as governed the Court's power to promulgate Equity Rules, would engender confusion or controversy as to the status of the Conformity Act. On the other side, there were doubts about the constitutionality of a supersession provision, doubts that were met with the argument that Congress could itself repeal undesigned statutes in futuro by such a provision.

The circumstances that brought forth this sort of provision in the federal system have changed. The 1948 revision of the Judicial Code saw the express repeal of many statutory provisions touching practice and procedure including, of course, the Conformity Act. Moreover, Congress is aware of, and legislates against the background of, the Federal Rules of Civil Procedure and other supervisory court rules.¹¹ The practical problem that existed in 1914, when the supersession provision was debated, and in 1934, when the predecessor of 28 U.S.C. § 2072 was enacted, thus is of greatly diminished dimensions. Indeed, an argument can be made that quite the reverse problem exists, that Congress too rarely adverts to the possible need for specialized procedure -- as opposed to the trans-substantive procedure of Federal Rules -- when it enacts legislation.¹² To the extent that Acts of Congress do contain provisions that are inconsistent with proposed rules or amendments, it should be possible for the rulemakers, in coopera-

tion with, for instance, the Congressional Research Service, to identify those provisions and to recommend that Congress repeal them. This, I take it, is one of the purposes behind the last sentence of proposed § 2074(a) in Section 2 of the bill.

I expect that those who favor the retention of a provision for superseding effect will argue that even careful research will not disclose every statute with which a proposed rule or amendment is arguably inconsistent and that, therefore, such questions may become a fertile source of litigation. It may also be argued that the need to resort to existing supersession provisions has not often arisen, the point being that they are a hedge against the unintended that have little practical (as opposed to symbolic) importance.

The arguments are, of course, in tension. If under the existing system conflicts have rarely arisen between Acts of Congress and subsequently prescribed supervisory rules,¹³ will not such conflicts be rarer still when the rulemakers are charged to avoid them (or to recommend repeal of the offending statutes)? And as to any residual unintended conflict, it may fairly be asked how the costs (including a "mistake" by the rulemakers that can be remedied by legislation they recommend) and benefits of the proposed system (no superseding effect) compare with the comparable net for the present system.

One cost entailed by the supersession provision in 28 U.S.C. § 2072 has become evident in recent years. In 1983 the Civil Rules Advisory Committee proposed an amendment to Rule 83 that, in my view, was inconsistent with § 2071.¹⁴ Although the amendment

to Rule 83 promulgated by the Supreme Court on April 29, 1985 (effective August 1 unless Congress intervenes) does not include the originally proposed provision for local rules inconsistent with the Federal Rules of Civil Procedure, it is nonetheless troublesome. Apart from the basic question whether Rule 83 is invalid because not a "general rule" within the meaning of § 2072, the Court's amendment continues to require, in terms at least, consistency only with the Federal Rules of Civil Procedure, in contravention of 28 U.S.C. § 2071. Moreover, the rulemakers contemplate greater power in the judicial councils than exists under current law or than would be conferred by Section 4(a) of H.R. 2633. Finally, there are other differences between Rule 83 as amended by the Court and the bill, and these differences would be magnified if changes I suggest were adopted.

In addition, the Advisory Committee has twice proposed amendments to Rule 68 that many people believe are inconsistent with Acts of Congress.¹⁵ The sobering fact is that, if rules or amendments promulgated by the Court are not blocked by Congress, and if they are found valid under the Enabling Act (none has ever been invalidated), they prevail in any conflict with existing Acts of Congress. Because Congress must consider that possibility in reviewing proposed rules, one cost of the present system is to put additional pressure on Congress to step in.

The legal climate has also changed since 1914 or 1934. The Supreme Court's decision in Chadha has drawn in question whether provisions for superseding effect are in fact constitutional.¹⁶ After all, on one view, they purport to authorize the repeal of

federal statutes, a legislative act, by a process other than that prescribed by Article I of the Constitution.¹⁷ Can the repeal fairly be attributed to Congress (in the enabling act) when that which is to be repealed is unknown at the time Congress acts? Does it make a difference if one concludes that the power with respect to supervisory rules is shared by Congress and the Supreme Court and on that hypothesis does not require legislative authorization for its exercise? Does Chadha foreclose Congress from ceding, as part of an otherwise valid delegation, its supremacy in an area of shared power (retaining all the while the power to reassert it)? These are difficult questions that should perhaps be avoided.

In my view, the burden should be placed on the rulemakers to demonstrate that the benefits of a provision for superseding effect outweigh the costs of such a provision. I doubt that the case can any longer be made. Moreover, even if it can, difficult constitutional questions remain to be answered before Congress perpetuates the current system.

Assuming a decision is made to assert the supremacy of statutes, the question remains whether the language in the bill is the best formulation for the purpose. Although the alternative "not inconsistent with any law of the United States," has a pedigree,¹⁸ it should not for that reason be preferred. Indeed, the word "law" in both formulations may be undesirably ambiguous, and if it is retained, the legislative history should clarify what is intended. The word obviously imports statutes. Does it also include treaties? Valid administrative regulations? Apart from

that matter, an argument in favor of the "not supersede" vs. "not inconsistent with..." formulation is that it would clearly permit the rulemakers to propose rules or amendments that would be effective in cases not covered by an inconsistent provision of "law" (as well as to propose legislation designed to remove the inconsistency). Particularly if, as I suggest, Congress pays more attention to the need for procedure tailored to substantive policies, that flexibility is important.

Finally, whatever formulation is chosen denying supervisory rules superseding effect, account must be taken of proposed supervisory rules that have been transmogrified into statutes (e.g., the Federal Rules of Evidence and Federal Rule of Civil Procedure 4). Assuming that Congress may constitutionally provide for their supersession by court rules, an easier proposition to carry than that addressed earlier, I would suggest identifying them and so providing in a discrete section of the bill.

2. I applaud the provision in proposed § 2074(a) requiring the Supreme Court to "transmit with such proposed rule proposed amendments to any law, to the extent such amendments are necessary to implement such proposed rule or would otherwise promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." I believe, however, that proposed § 2073(a)(1) should be revised so as to make that provision fully effective.

H.R. 2633 contains a number of safeguards against rulemaking proposals that are ill-considered or ultra vires, and it should therefore help to get Congress out of the business of regularly

reviewing supervisory court rules on the merits. I continue to doubt, however, that "all the procedural safeguards in the world will prevent controversy where it counts -- in Congress -- because the rulemakers' reaction to controversy in the lawmaking process will necessarily continue to be ad hoc."¹⁹ For that reason, I have recommended that the Judicial Conference "consider the formulation of standards or guidelines delineating the proper spheres of activity of its Rules Committees."²⁰ Professor Remington has made a similar recommendation.²¹ To ensure that this happens, proposed § 2073(a)(1) should require the Conference to prescribe and publish not only "the procedures for the consideration of proposed rules under this section" but also "standards or guidelines for the exercise of the power conferred by section 2072 of this title."

The sentence in question in proposed § 2074(a) is addressed in part to the problem of existing inconsistent statutes, but it does not confine recommendations for legislation to that situation. My proposal would "permit the rulemakers to make recommendations for legislation regarding matters that have been identified as falling beyond the rulemaking power. Indeed, there is much to be said for a procedure that would permit the submission to Congress of all provisions in the area of procedure, broadly defined, that are thought to be needed, divided into two groups: those subject to congressional review and those requiring congressional approval [legislation]."²²

Section 3. Compilation and Review of Local Rules

I am also pleased to note the proposed amendment to the fourth paragraph of 28 U.S.C. § 331 contained in Section 3. The amendment would solve a problem that currently exists in overseeing the implementation of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.²³

Section 4. Rules by District Courts and Orders by Circuit Judicial Councils

1. I have already referred to the overlap and potential inconsistency between the statutory amendments proposed in Section 4(a) and the recently promulgated amendment to Rule 83. In my view, the second sentence of the proposed amendment of 28 U.S.C. § 2071 should include reference to the Judicial Conference, which, under the proposed amendment to 28 U.S.C. § 331 in Section 3, would have the power to modify or abrogate rules prescribed under § 2071. I take it that this sentence is not intended to foreclose (if it could) invalidation by a court in litigation, although that perhaps should be clarified.

More fundamentally, it is not clear to me why the requirements of this proposed amendment of § 2071 should not be applied to "all courts established by Act of Congress," the scope of that section. Certainly, the perceived problems with local court rulemaking have not been confined to the district courts.²⁴ I expect that some individuals are opposed to a notice and comment procedure for any local court rulemaking. But the rulemakers themselves have imposed that requirement on district courts in the recently promulgated amendment to Rule 83. Apart from the Supreme Court, I am not

aware of material differences among courts covered by § 2071 that make notice and comment rulemaking appropriate for some but not for others. The procedure may be somewhat more complicated, logistically, for courts of appeals and the specialized courts. But that hardly seems adequate reason to exempt them. I recognize the delicacy of prescribing rulemaking procedures for the Supreme Court and would suggest exempting it as has been done in the amendment to 28 U.S.C. § 2077(b) proposed in Section 2 (which I favor). In light, however, of experience indicating that the Court could benefit from advice with respect to its own rules,²⁵ Congress should urge the Court voluntarily to follow rulemaking procedures required of other courts.

Finally, I ask you to consider, in connection with any amendment to § 2071, language that would permit a court to act in an emergency.²⁶

In sum, I would suggest replacing the language in Section 4(a)(1)(B) of the bill with the following:

Except as provided hereafter, any such rule prescribed by a court other than the Supreme Court shall be made or amended only after giving appropriate public notice and an opportunity for comment. Such rule so made or amended shall take effect upon the date specified by the prescribing court. A rule or amendment of a district court shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit or the Judicial Conference, or held invalid by a court. Any other such rule or amendment shall remain in effect unless modified or abrogated by the Judicial Conference, or held invalid by a court. Copies of rules so made or amended by a district court shall be furnished to the judicial council, and copies of all rules so made or amended shall be furnished to the Administrative Office of the United States Courts and made available to the public.

Where the prescribing court determines that there is an immediate need for a rule or amendment, it may proceed without first affording notice and an opportunity for comment; provided, however, that it promptly thereafter affords such notice and opportunity for comment.

2. The amendment to § 332 proposed in Section 4(a)(2) confirms what the section-by-section analysis of H.R. 6344 suggests, namely that "[t]he circuit review authority parallels that given to the Judicial Conference,"²⁷ in the sense that it is power to modify or abrogate only local rules "found inconsistent" with "rules prescribed under Section 2072 of this title." But the amendment to Rule 83 proposed in 1983, and that recently promulgated by the Court, contemplates a much broader power.²⁸ Here again, there is room for mischief as a result of lawmaking processes proceeding in tandem. In any event, the conflict sets in relief the question whether the councils' power to abrogate local rules should be confined as it is in H.R. 2633.

Those in favor of broader power may argue that there should be a check on district court rules that, although not inconsistent with supervisory rules, are nonetheless unwise (or invalid). They also may note that the limited power conferred by this bill would not permit a council to achieve intracircuit (interdistrict) uniformity on matters where it was thought important.

Those opposed to broad power in the councils are likely to argue that councils have been known to act unwisely and to point out that the amendment to Rule 83, contemplating such broad power, provides no procedural safeguards against hasty or ill-informed council action. They may also note that, notwithstanding the

reorganization of the judicial councils in 1981, those bodies are still dominated by court of appeals judges. Broad control of district court rules by court of appeals judges was rejected in 1937,²⁹ and, it might be argued, it should be rejected today. Finally, as to intracircuit uniformity, the opponents of broad power in the councils might respond that, if uniformity has reached that level of consciousness, it should be pursued through national (supervisory) rules.

In the circumstances, it is important for Congress to be aware of these conflicting views and to settle what the scope of the councils' power with respect to district court rules should be.

3. I support the proposed amendment to 28 U.S.C. § 372(c)(11) requiring notice and comment in connection with rules prescribed by the judicial councils and the Conference for the conduct of proceedings under § 372(c).³⁰ In addition, the councils should be encouraged to use an advisory committee in considering disciplinary rules or amendments. The Third Circuit Judicial Council has used the committee required by § 2077(b) for that purpose.

* * *

In conclusion, I wish to commend you, Mr. Chairman, and the members of the Subcommittee, for the attention you are devoting to this important subject. "Law reformers have long assured us that procedure is technical, details -- in short, adjective law."³¹ The controversy surrounding the Civil Rules Advisory Committee's proposals to amend Rule 68 is only the latest reminder

that it is not so. Whatever differences I may have with you on some of the provisions of H.R. 2633, I believe that it represents a real advance and hope, therefore, that it will receive prompt consideration by Congress.

FOOTNOTES

1. See generally J. Weinstein, Reform of Court Rule-Making Procedures (1977); W. Brown, Federal Rulemaking: Problems and Possibilities (1981); Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982).

Federal "supervisory" court rulemaking refers to the formulation of prospective rules by the Supreme Court to govern proceedings in the lower federal courts. Federal "local" court rulemaking refers to the formulation of prospective rules to govern proceedings in the prescribing court.

2. See Rules Enabling Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess. (1985) [hereinafter cited as Hearings].
3. Burbank, supra note 1.
4. Burbank, Sanctions in the Proposed Amendments of the Federal Rules of Civil Procedure: Some Questions About Power, 11 Hofstra L. Rev. 997 (1983).
5. Attachment A.
6. Burbank, Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U. Pa. L. Rev. 283 (1982) [hereinafter cited as Procedural Rulemaking]; Burbank, The Federal Judicial Discipline Act: Is Decentralized Self-Regulation Working?, 67 Judicature 183 (1983); see also Attachment B.

7. See Hearings, supra note 2, at 64-67, 204-26.
8. Id. at 213-15.
9. See, e.g., 28 U.S.C. §§ 2072, 3771 (1982), But see 28 U.S.C. § 2075 (1982). For the reasons Congress determined not to continue the superseding effect of bankruptcy rules, see Hearings, supra note 2, at 229 n.1. Care should be taken not to reverse that policy judgment inadvertently, as might have occurred had H.R. 6344, 98th Cong., 2d Sess. (1984) been enacted. See id. § 2(a).
10. For the history, see Burbank, supra note 1, at 1050-54.
11. See Califano v. Yamaski, 442 U.S. 682, 698-701 (1979).
12. To that end, in considering proposed legislation, Congress should require a Procedural Impact Statement, the purpose of which would be to ensure that existing federal procedure adequately will serve a bill's substantive policies.
13. For cases involving a conflict, see W. Brown, supra note 1, at 99-100; 2 J. Moore, Moore's Federal Practice ¶ 1.02[5] (1984).
14. See Attachment A.
15. See, e.g., Hearings, supra note 2, at 139-48.
16. See INS v. Chadha, 462 U.S. 919 (1983). Of course, constitutional doubts were expressed as early as 1914, see supra at 3, and they continued to be voiced. E.g., 374 U.S. 865 (1963) (Black and Douglas, J.J.); 383 U.S. 1032 (1966) (Black, J.); Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 64-77 (1977).

17. "Amendment and repeal of statutes, no less than enactment, must conform with Art. I." Chadha, 462 U.S. at 954 (footnote omitted). "There is no provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I." Id. n.18. "The explicit prescription for legislative action contained in Art. I cannot be amended by legislation." Id. at 958 n.23. "But the steps required by Art. I, §§ 1, 7 make certain that there is an opportunity for deliberation and debate. To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I." Id.
18. See supra at 3.
19. Burbank, supra note 1, at 1195.
20. Id. (footnote omitted).
21. See Hearings, supra note 2, at 267-68.
22. Burbank, supra note 1, at 1195 n.775.
23. See Attachment B at 10.
24. See J. Weinstein, supra note 1, at 117-45.
25. See, e.g., Hearings, supra note 2, at 37 n.3.
26. Cf. J. Weinstein, supra note 1, at 151 ("To meet emergency situations a court should have the power to adopt a local rule for no more than one year.").
27. 130 Cong. Rec. E4105-06 (1984); Hearings, supra note 2, at 180.
28. See Hearings, supra note 2, at 216-17; Attachment A at 6; 105 F.R.D. 179, 227 (1985).
29. See Attachment A at 6.

30. See Burbank, Procedural Rulemaking, supra note 6, at 341-42; Attachment B at 10.
31. Burbank, Afterwords: A Response to Professor Hazard and a Comment on Marrese, 70 Cornell L. Rev. 659, 662 (1985).

ATTACHMENT A

UNIVERSITY of PENNSYLVANIA

PHILADELPHIA 19104

February 27, 1984

The Law School
3400 Chestnut Street I4

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendments to Federal Rule of Civil Procedure 83

To the Committee:

I apologize for the delay in submitting comments on the proposed amendments that were disseminated in August. I understand from Professor Miller that the proposed amendment to Rule 68 does not require additional comment at this time. Accordingly, I will confine my observations to the Advisory Committee's proposals concerning Rule 83.

I. Background. Original Rule 83

At the outset, I should elaborate my doubts concerning the validity of Rule 83 as it presently reads (the Rule has not been amended). See Burbank, "The Rules Enabling Act of 1934," 130 U. Pa. L. Rev. 1015, 1193 n.763 (hereinafter cited as "REA"); Burbank, "Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power," 11 Hofstra L. Rev. 997, 998 n.2 (1983) (hereinafter cited as "Sanctions"). The Enabling Act (see now 28 U.S.C. § 2072) authorized the Supreme Court to make law "by general rules." Congress' purposes in making the grant, and in using the words in question, were made explicit in the Senate Report on a bill that, with the exception of one word, was identical to the 1934 Act. See Burbank, "REA," supra, at 1083-89, 1098-1106.

The purposes of the proposed legislation, embodied in this section, are manifest. But it may be well to put those purposes into definite expression. They are:

First, to make uniform throughout the United States the forms of process, writs, pleadings, and motions and the practice and procedure in the district courts in actions at law. It is believed that if this were its only advantage that lawyers and litigants would find, in uniformity alone, a tremendous advance over the present system.

Second, these general rules, if wisely made, would be a long step toward simplicity, a most desirable step in view of the chaotic and complicated condition which now exists.

* * *

S. Rep. No. 1174, 69th Cong., 1st Sess. 1-2 (1926) (emphasis added).

Shortly after the Act was passed, Professor Sunderland expressed the view that rules requiring strict conformity to state law were within the statutory authorization (and should be preferred to rules prescribing uniform federal procedure). See, e.g., Sunderland, "The Grant of Rule-Making Power to the Supreme Court of the United States," 32 Mich. L. Rev. 1116 (1934); Burbank, "REA," supra, at 1135. In arguing against Sunderland's position that "the Court would be complying with [Section 1 of the Enabling Act] if it issued a so-called general rule that the rules of practice in each district should conform to the local state practice," William D. Mitchell, the Chairman of the Advisory Committee, observed: "I have never supposed that this is what the statute means. It used the term 'general rules', which seems to me to contemplate rules that prevail generally in all the district courts, that is, a uniform set of rules applicable generally in each of the districts. I cannot read the statute in any other way." Letter from William D. Mitchell to Edson R. Sunderland (May 23, 1935) (Clark Papers, Yale University Library, box 108, folder 41). 1/ Thereafter, Sunderland modified his strong preference for conformity but not his basic interpretive position. See Sunderland, "Character and Extent of the Rule-Making Power Granted United States Supreme Court and Methods of Effective Exercise," 21 A.B.A.J. 404 (1935).

At its first meeting the original Advisory Committee considered the matter:

The first matter considered was the meaning of the term 'general rules' as used in the statute, and whether the statute contemplates that all rules promulgated shall operate uniformly in all the districts, or whether the Court may promulgate some rules for some districts and other rules for other districts. In this connection the discussion covered the question of conformity between state and federal practice. After full discussion, it was the unanimous opinion of those present that the statute contemplates that insofar as unified rules are promulgated they must operate uniformly in all the districts, that it is permissible under the statute that the rules may leave untouched certain fields not covered, in which case the existing system for the state procedure may apply, and that it is permissible under the statute, where the subject matter is not dealt with or cover-

1/ "My impression is that the word 'general' in the statute means precisely what it says and that the rules are to be general in the sense that there is to be a single set of rules generally applicable in each federal district, and that to vary the rules in different districts according to local state practice is not in the statutory sense a system of general rules." Id.

ed by the rules, to provide generally that insofar as any subject is not covered by the rules the state practice may be followed.

Summary of Proceedings of the First Meeting of Advisory Committee, Held in the Federal Building at Chicago, June 20, 1935
(1 Communications of the Advisory Committee on Rules for Civil Procedure for the District Courts of the United States, Harvard Law School Library; Clark Papers, box 108, folder 42 & box 104, folder 35).

The Committee thus appears to have accepted Mr. Mitchell's (patently correct) view that the Act called for uniform federal rules rather than conformity to state law but as well to have recognized that, as Sunderland suggested, there might be some matters as to which state law should govern. The problem, for one interested in a coherent and consistent interpretation of "general rules", lies in the Committee's ultimate position, evident from the rules finally approved, that it was permissible to require conformity to state law in discrete Federal Rules, rather than simply to leave the matter "untouched", i.e., leave it to other sources of law. In that regard, it is difficult for these purposes to distinguish Rule 83 from Federal Rules that require conformity. See, e.g., Rules 64 and 69. Of course, that says nothing about the validity either of Rule 83 or of Rules requiring conformity. And, as the above suggests, I do not believe that either can be squared with the language of the statute, read in light of its purposes. Whereas, however, the original departures, if such they were, made little difference, the proposed amendments to Rule 83 resist that conclusion.

At the time the original Advisory Committee was at work, there was considerable doubt about the effect of the Enabling Act or of rules promulgated pursuant to it on the Conformity Act (which was not formally repealed until 1948). Moreover, then as now, there was considerable doubt about the reach of the Rules of Decision Act. In such circumstances, a direction to follow state law in a few discrete Federal Rules was no more likely to evoke cries of protest for violating the Act's requirement of "general rules" than it was to evoke such cries for making a choice properly belonging to Congress (violating the Act's second sentence). See Burbank, "REA," supra, at 1147 & n.576.

Similarly, to the extent that Rule 83 merely incorporated existing statutory authority to prescribe local rules, it was unlikely to be challenged. The Advisory Committee was of the view that it was free to incorporate in the Federal Rules existing federal law from cases and statutes even if beyond its authority to prescribe in the first instance under the Act. See Burbank, "REA," supra, at 1147-57. The Advisory Committee's Note to Rule 83 suggests that what I have called the incorporation principle was at work here:

This rule substantially continues U.S.C., Title 28, §731 (Rules of practice in district courts) with the additional requirement that copies of such rules and amendments be furnished to the Supreme Court of the United States. See Equity Rule 79 (Additional Rules by District Court). With the last sentence compare United States Supreme Court Admiralty Rules (1920), Rule 44 (Right of Trial Courts to Make Rules of Practice) (originally promulgated in 1842).

It is important to note, however, that Rule 83 departed from 28 U.S.C. § 731 in failing to require that local rules be consistent with "any law of the United States" and that the last sentence of the Rule was entirely new. More precisely, Admiralty Rule 44 and its forebears themselves incorporated statutory authority. See Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276; R. S. § 913. I am not aware of any statute that Rule 83, in its last sentence, could be said to incorporate. Indeed, there was a statute, the Conformity Act, that pointed in the opposite direction, and it was precisely the purpose of the last sentence of Rule 83 to "prevent being thrown back on the Act in case it should be found that there was still a place not covered by the Rules." "'Open Forum' Discussion of Proposed Rules of Civil Procedure," 23 A.B.A.J., 965 (1937). See also Advisory Committee Note to Rule 2. As Mr. Mitchell wrote to Dean Clark:

We have in effect, under Rule [83], abolished the conformity act by providing that in all matters not provided for by the rule promulgated by the Supreme Court or the local rules consistent therewith adopted by the district courts, the district courts may regulate their practice as they choose and not be required to adhere to the conformity act.

Letter from William D. Mitchell to Charles E. Clark (October 13, 1937) (Clark Papers, box 111, folder 58).

Whether or not the Court had the power to "abolish the conformity act" through a provision like the last sentence of Rule 83 - and I would argue that it did not because the provision is not a "general rule" - the damage, if any, was short-lived. With the formal repeal of the Conformity Act in 1948, the district courts could rely on their Article III power to formulate rules of procedure in the context of adjudication, subject to the Rules of Decision Act. 2/

We are almost ready to turn to the proposed amendments to Rule 83. First, however, it is useful to pursue one matter raised above, as the analysis tends to confirm the broad conclusion of invalidity of the original Rule and to reaffirm the importance of facing questions of power at this time.

2/ For a perplexing, but surely academic, problem of federalism posed by the last sentence of Rule 83 (assuming it is valid), see Burbank, "REA," supra, at 1193 & n.763.

By the terms of the Enabling Act, as now of 28 U.S.C. § 2072, a valid Federal Rule supersedes a (previously enacted) federal statute with which it is in conflict. It has been noted above that Rule 83 was in conflict with 28 U.S.C. § 731 insofar as the latter required local rules to be consistent with statutes whereas Rule 83 did (and does) not impose that requirement. Indeed, the Advisory Committee's Note suggests an intent to supersede (by "substantially" continuing) § 731. If Rule 83 is valid, local rules need not be consistent with (previously enacted) federal statutes. But, we are told, local rules must be consistent with federal statutes. See Colgrove v. Battin, 413 U.S. 149, 161 n.18 (1973); 12 C. Wright & A. Miller, Federal Practice and Procedure § 3153 (1973). The reason is unclear, unless Rule 83 is, as I have argued, invalid. 3/

If Rule 83 is to be amended, it should at least faithfully incorporate the provisions of 28 U.S.C. § 2071.

II. The Proposed Amendments

If I am correct that Rule 83 is not a "general rule" and that (with the exception of the question of superseding effect) the Rule's first sentence was intended to incorporate federal statutory law, the proposed amendments present a classic problem of that technique:

[E]ven where the federal law incorporated in a Federal Rule is contained in an Act of Congress, the technique can cause problems under the Act. For if the need arises to change the Rule, there is doubt whether change can be effected by the rulemakers or must be made, if at all, by Congress.

Burbank, "REA," supra, at 1155-56.

In this instance, there are good reasons to prefer Congress to the rulemakers as lawmaker in the areas touched by the proposed amendments.

First, Congress is presently considering reform of federal court rulemaking. See H.R. 4144, 98th Cong., 1st Sess. (1983). Although Representative Kastenmeier's bill focuses on supervisory court rulemaking, section 3 deals with local court rules. Thus,

3/ One might argue in response that the 1948 revision that gave us 28 U.S.C. § 2071 constitutes a subsequent superseding statute. But that argument is foreclosed by § 2072's provision to the effect that "[n]othing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

the argument from legislative inertia often made by those who favor court rulemaking over legislation is inapposite. Indeed, on questions of rulemaking process, not even the argument from institutional competence favors the rulemakers.

Second, the proposed amendments assume power in a judicial council to "nullify a local rule at any time." As indicated in the enclosed letter commenting on Representative Kastenmeier's bill, the existence of such power is by no means clear. In that regard, it may be more than a matter of historical interest to note that in 1937 the Advisory Committee and the Court finally rejected an alternative version of [what became] Rule 83, twice published, that would have required "the concurrence of a majority of the circuit judges for the circuit" in local court rules. See American Bar Association, Cleveland Institute on Federal Rules 357 (1938). When the judicial councils were created in 1939, they consisted exclusively of circuit judges. Other problems of interpretation aside, in making a general grant of authority to the councils in section 306 of the Administrative Office Act of 1939 (Act of Aug. 7, 1939, Pub. L. No. 76-299, § 306, 53 Stat. 1223, 1224), should Congress be thought sub silentio to have overruled the Court's explicit choice not to invest the circuit judges with a general veto power over local rules? 4/ Finally in this aspect, although H.R. 4144 is ambiguous on these matters, there is at least a strong possibility that the scheme of review it contemplates is inconsistent with that proposed in the amendments to Rule 83. Passing the problem of determining which should control if both become effective (see below), would it not be better for Congress to decide upon the appropriate review mechanism and, to the extent that the judicial councils or the Judicial Conference is part of that mechanism and there is doubt about the adequacy of existing grants of power for this purpose, to amend 28 U.S.C. § 331 or § 332?

4/ This argument speaks only to the proper interpretation of Section 306. The general grant of authority in that section was codified, with "changes in phraseology," at 28 U.S.C. § 332 and was "essentially recodified" in 1980. See H.R. Rep. No. 96-1313, 96th Cong., 2d Sess. 9 (1980). As suggested in my letter to Representative Kastenmeier, I believe that § 332 probably does authorize a council to deal with local rules in extraordinary situations implicating the administrative concerns with which that section is instinct, but the Advisory Committee appears to attribute to the councils far greater power (i.e., to abrogate a local rule for invalidity, for inconsistency with the Federal Rules, for failure "to promote inter-district uniformity and efficiency," and for "undermin[ing] the basic objectives of the Federal Rules.") Of course, Congress can amend § 332, and it may wish to do so, particularly now that the councils include district court judges. See below.

Third, the proposed amendment that would permit, under certain conditions and for a limited time, the adoption of a local rule that is inconsistent with a Federal Rule renders the consideration of questions of power inescapable. 28 U.S.C. § 2071 requires that local court rules be consistent with Federal Rules (as well as with statutes). Unless one is willing to reason that amended Rule 83 would be a Federal Rule and that a local court rule inconsistent with, say, Rule 30, would nonetheless be saved by consistency with its provision for inconsistency - and I am not - there is a conflict between the statute and the proposed amendment. If the proposed amendment is valid, by reason of § 2072 it supersedes § 2071. But if that is the case, one may well ask again why the Supreme Court and distinguished commentators have held that local rules must be consistent with statutes. There is, I think, no satisfactory analytical answer.

Those who would distinguish the two requirements (consistency with statutes and consistency with Federal Rules) on grounds of importance or institutional competence and who are anxious that experimentation proceed, I would urge to pause. In the last two decades, we have gradually come to realize that our system of allegedly uniform and allegedly simple trans-substantive federal rules is no longer, if it ever was, adequate for the litigation in federal courts. The rulemakers' response has been a series of amendments, typically of narrow focus, one recent set of which was described by Justice Powell as "tinkering changes." See Burbank, "Sanctions," *supra*, at 998 & n.3. With these proposed amendments to Rule 83, the rulemakers carry us further away from the procedural philosophy that animated the 1934 Act and the original Federal Rules. That is not necessarily bad; indeed, it is almost surely inevitable. But would it not be preferable to know where we are going?

Neither judges nor those who write about their work product have shown much interest in the jurisprudence of federal court rulemaking. As a result, we lack an accepted framework within which to evaluate prospective procedural rules. Moreover . . . our impoverishment is particularly acute with respect to local rulemaking. . . . Unless rulemakers can be brought to an articulated, or at least articulable, position on such issues as level of detail, uniformity, and rulemaking power, we are doomed to a regime characterized by ad hoc justification on the one hand and ad hoc repudiation on the other.

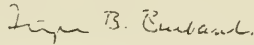
Burbank, "Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980," 131 U. Pa. L. Rev. 283, 309 (1982).

Sooner or later, we must rethink federal procedure, and if, as I expect, the product of that exercise will look radically different from what was contemplated in the Enabling Act, what

was given us in 1938, and indeed what we have today, Congress should play a part. I believe that the time has arrived, and that, apart from questions of power, Congress' involvement would be useful. Indeed, it may take a congressional initiative to stimulate sustained thought.

I hope that these comments are helpful.

Sincerely,



Stephen B. Burbank
Associate Professor and Associate
Dean

SBB/ec
Enc.

ATTACHMENT B

PREPARED STATEMENT
OF

STEPHEN B. BURBANK
ASSOCIATE PROFESSOR AND ASSOCIATE DEAN
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

BEFORE THE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE
ADMINISTRATION OF JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ON
JUDICIAL DISCIPLINE

APRIL 25, 1985

Mr. Chairman and Members of the Subcommittee, I appreciate the invitation to testify before the Subcommittee, and I hope that my testimony will be helpful in the important enterprise of overseeing the implementation of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act"). Three and one half years have passed since the Act became effective. During that period, the media have drawn the public's attention to allegations of misconduct against a number of federal judges, and questions have been raised about the adequacy of the Act's implementation by the judiciary. The Subcommittee is to be commended for fulfilling Congress' commitment to "vigorous oversight,"^{1/} for taking the initiative to determine whether the Act's experiment in judicial self-regulation is working. You will no doubt hear from other witnesses that, on the whole, it is. My basic point is that the public, less conversant with experience under the Act, less aware of the extraordinary burdens under which the federal judiciary labors, and less confident of the integrity and good faith of the members of that group, has precious little reason to assent to that conclusion.

My interest in the Act is both scholarly and practical. As a scholar, I have been concerned with rules of procedure formulated by the federal judiciary pursuant to congressional delegation.^{2/} The practical interest derives from my service as co-reporter for the original rules of the Third Circuit Judicial Council to implement the Act and as reporter for the Council's 1984 amendments. The two interests converged in articles that I have written on the implementation of the Act nationally, a long study in the University of Pennsylvania Law Review^{3/} and a shorter version in Judicature.^{4/}

As the members of the Subcommittee well know, the Act is the product of a series of compromises, both great and small. A great compromise was achieved when Congress agreed to drop removal as a sanction and another when a centralized disciplinary model typical of the States was rejected in favor of the decentralized administrative structure of the federal judiciary. Congress recognized, however, that the disciplinary powers of the judicial councils under that structure were in doubt, and that occasional exercises of power by the councils had been thought by some to threaten the independence of individual federal judges. Moreover, by 1980 Congress had evidence, in existing council rules relating to judicial conduct and disability, of "glaring disparities between circuits, both with regard to the specific procedures they establish[ed] and the elements of process they cover[ed]."^{5/} Accordingly, in the Act, Congress prescribed to a certain extent the procedures to be followed in reviewing and resolving complaints. Moreover, extending an invitation that it plainly expected to be accepted, Congress not only authorized the judicial councils of the circuits to promulgate rules of procedure implementing the Act, but it also specified rights that must be accorded in any such rules to a judge or magistrate who is the subject of a complaint and to a complainant.^{6/} Finally, Congress endowed the Judicial Conference with power to modify any rule promulgated by a judicial council and itself to prescribe rules.^{7/}

In my studies of the implementation of the Act by the judicial councils, I concluded that (1) it was too early to make a definitive assessment of self-regulation under the Act, but that (2) the councils' rules, the procedures employed in their promulgation, and the

amount and quality of information available to those interested in making any assessment raised questions whether the Act's goals were being achieved. Those goals were "to improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's justice system and, at the same time, to maintain the independence and autonomy of the judicial branch of government."^{8/} A definitive assessment would still be premature, but the additional one and one half years of experience under the Act furnish evidence that at least some of the risks I perceived in the councils' approach to the implementation of the Act are serious.

My analysis of the councils' rules revealed that, with rare exceptions, the councils did little more than track the provisions of the Act. I considered the reasons why that approach had been taken as well as its benefits. It was my view in 1983 and, because the councils have made few amendments to their rules in the intervening years,^{9/} it is my view today, that those benefits are outweighed by the costs of rulemaking minimalism. One such cost is the opportunity cost of experimentation. As I read the Act's legislative history, the argument for local experimentation was the main reason why Congress ultimately agreed to leave primary rulemaking authority in the judicial councils rather than, for example, further to elaborate procedure in the Act or to repose primary authority in the Judicial Conference.

A far more significant cost, in my view, is the risk that rule-making minimalism poses to the Act's goals of public accountability and judicial independence. "In failing to elaborate the statutory

process, most of the councils appear to have given insufficient weight to the peculiar need for certainty and predictability in this context."^{10/}

With few exceptions, the councils have declined to answer the procedural questions that a complainant, a judge or magistrate who is the subject of a complaint, and the public are likely to regard as most important: how a special committee appointed by a chief judge will conduct its investigation; how a judicial council will proceed after receipt of the report of a special committee, and how a council will handle petitions to review the action of the chief judge in dismissing or concluding a complaint. Moreover, to date, there are no adequate alternative means to obtain this information.

From the perspective of a complainant or an interested member of the public, the councils' rules provide little assurance that the most serious complaints -- those that are certified to a special committee -- will be considered in an orderly, thorough and fair manner. Because the Act was responsive more to appearances than to reality, the provision of such assurance is not an act of cynicism but a critical step in meeting the goals of the legislation. The same is true of the process by which the councils consider petitions for review. "In most circuits complainants and the public lack assurance that a chief judge will not participate in decisions on petitions for review and knowledge of the information that will be considered by the council. They are required to accept on faith that informality and collegiality will not lead to ad hoc manipulation."^{11/}

From the perspective of a judge or magistrate who is the subject of a complaint, uncertainty on important matters of procedure constitutes a threat to his or her judicial independence. Here, we have

some evidence that the risk is not merely the figment of an academic's imagination. For, according to a news report of the recent public hearing held by a special committee appointed to investigate Judge Lord, on the first day of that hearing the presiding officer "announced that, contrary to the investigatory committee's initial guidelines, counsel for both the complainant and the respondent would be allowed to cross-examine witnesses."^{12/} Judge Lord's counsel, former Attorney General Ramsey Clark, has told me that this was not the only surprise that greeted participants in the disciplinary proceeding and associated appeal, leading him to conclude that "the Eighth Circuit proceeded essentially without rules."^{13/} In my view, federal judges and magistrates are entitled to knowledge of their procedural rights in advance. The lack of that information "may be reason enough not to engage in conduct that could be made the subject of a colorable complaint, quite a chill when one recalls the Act's substantive ambiguity."^{14/}

A second aspect of the councils' rulemaking that I considered in my studies was disuniformity. Obviously, in opting for local experimentation at the start, Congress anticipated a certain amount of disuniformity in the councils' rules. Just as obviously, in my view, it looked to the Judicial Conference to resolve at some point consequential inconsistencies in the councils' rules. The thrust of my work was to suggest an approach for identifying when disuniformity is tolerable, or even to be encouraged, and when uniformity would better serve the purposes of the legislation. My major point in this aspect, however, was -- and it remains true today -- that "actual conflict between council rules is the exception. Since most of the

councils have chosen not to elaborate the skeletal procedure set forth in the Act, the problems of minimalism and disuniformity merge. The Judicial Conference simply cannot ascertain from council rules, and it is unlikely to learn from other existing sources, the extent to which the procedure followed in most aspects of processing complaints differs among the circuits."^{15/}

In August 1983, the Conference's Committee on Court Administration sponsored a questionnaire designed to determine the procedures in processing complaints under the Act that had been or would be used in the various circuits. The results of that survey, which the authors of the analysis cautioned was preliminary, reveal uncertainty on numerous important procedural steps and confirm my conclusion that "[t]he possibility of intercircuit conflict in procedure is . . . a more serious problem . . . than the existence of conflict."^{16/}

Finally in connection with the councils' rules, my studies pointed out that even though, viewed as a whole, those rules do little more than track the Act, there are a surprising number "that conflict with the terms of the Act, are inconsistent with its animating policies, or exceed its grant of rulemaking authority."^{17/} For example, it was not until October 1983 that the Tenth Circuit Council revised its 1978 rules to bring them into conformity with the Act. The rules of another council purport to authorize a separate, parallel complaint mechanism involving chief district judges.^{18/} Still another's rules purport to require that a complaint be filed "within one year of the action complained of."^{19/} Moreover, the limited experience with complaints that progress to

the special committee stage suggests that problems of inconsistency with the Act are not confined to the councils' rules. Thus, as part of its investigation of a complaint, a special committee of the Ninth Circuit Council delegated to a lawyer/investigator the duty of conducting a hearing. Although I am aware that this mode of proceeding received the prior blessing of the Administrative Office and the, albeit more qualified, approval of the standing committee of the Judicial Conference on review of the council's action,^{20/} in my view, it presents a serious question of inconsistency with both the language and the legislative history of the Act.

An assessment of the extent to which the councils' implementation of the Act has furthered the goal of public accountability should not be limited to an analysis of the councils' rules. In formulating those rules, many of the councils did not provide an opportunity to comment even to the individuals, federal judges and magistrates, against whom complaints may be filed. Moreover, little effort has been made to make the public aware of the existence of the Act, of council procedures, or of actions taken pursuant to the Act. For present purposes, however, the matter of greatest interest is the information available for congressional oversight.

Prior to the current reporting year, neither the information collected by the Administrative Office nor that presented, as required by the Act, in the annual report of the Director, has been adequate for congressional oversight. Problems with the table included in the Director's annual reports have included: inability to determine the total number of complaints dismissed by chief judges or the action of councils on petitions for review, and the lack of

useful information regarding complainants, complaint allegations, and special committee and council investigations. As of July 1, 1984, the Administrative Office revised its forms and procedure for reporting on complaint dispositions. The new form represents a significant improvement, although differences among the rules and practices of the councils continue to make the collection of useful statistical information on a number of matters difficult if not impossible. In any event, that advance will enhance public accountability only if the more useful information available as a result of the new reporting system is conveyed in future annual reports of the Director.

Recommendations

The problems I identified in my studies of the Act's implementation, most of which subsist today, require congressional attention. Few of them, however, should require congressional action in the form of additional legislation.

In my articles, I suggested that a national initiative, led by the Judicial Conference, was appropriate, and probably necessary, in order to address perceived deficiencies in the councils' rules. The authority of the Conference to abrogate invalid council rules and to eliminate unwarranted disuniformity among council rules is clear, and it should be exercised. Others disagree with my conclusion that the Conference also has a general power to direct the councils to adopt rules of designated content. In any event, there is support for the proposition that, while uniformity, at least on some matters, is desirable, it should not be enjoined. In order, I take it, to

accommodate both positions, the Conference has apparently suspended its own work on uniform or model rules pending results of work done under the direction of the Conference of Circuit Chief Judges. It is my understanding that the Federal Judicial Center intends to report back to the latter group with a proposed set of model rules in September.

In the circumstances, I hope that the Subcommittee will make clear its expectations that the model rules project will proceed expeditiously and that, without awaiting the results of that project, the Conference will revise any existing council rules found by it to be invalid. In light of the councils' track record in this area and of doubts expressed about the extent of the Conference's rulemaking authority, I also believe that it would be helpful if the Subcommittee attempted to clarify whether, in the event the model rules project fails to stimulate the councils meaningfully to revise their rules, the Conference may step in to address the problems created by what I have called the merger of minimalism and disuniformity. It may be that a perfecting amendment to the Act is necessary for that purpose. Finally in this aspect, the Subcommittee may wish to urge the Judicial Conference to prescribe rules for the exercise of its authority under the Act. The expectation that the Conference would do so is explicit in the Act's legislative history. As permitted by the Act, the Conference has delegated its review function to a standing committee, chaired by Judge Haynsworth. That committee, ably staffed by the Administrative Office, has been a model of responsiveness to requests for information and has gone to considerable lengths to demonstrate its serious attention to, and thorough consideration

of, the matters before it. There is doubt, however, about its power to promulgate rules and, apparently, doubt among its members about the need for such rules. I would simply point out that the committee considered a number of petitions for review from council actions on petitions for review from chief judge orders before realizing that it was without jurisdiction to do so. Prospective rules should prevent that sort of inefficiency. In addition, they can provide assurance to members of the public who are not privy to the committee's painstaking opinions that the process is fair.

In terms of the Act's goal of public accountability more broadly conceived, the Subcommittee can perform a valuable service by helping the judiciary to help itself. First, the Subcommittee should consider the advisability of amending provisions of the United States Code to ensure that there is broader consultation by the councils in rulemaking under the Act.^{21/} Second, the Subcommittee should consider whether the Act should be amended to extend the requirement of public availability to orders entered by the chief judge and by the council acting on review petitions, so long as the complainant and the judge or magistrate who is the subject of the complaint are not identifiable.^{22/} Third, the Subcommittee should make clear its expectation that all orders required to be made publicly available, under current law or the Act as it may be amended, will also be available in one place. At present, no such central repository exists. Finally, the Subcommittee should ensure that the Administrative Office intends to provide information more useful than that hitherto contained in the Director's annual reports, information that, with the new reporting system, the Office now has the capacity

to provide. If necessary, the Act should be amended to reflect more adequately the information that is necessary for effective oversight.^{23/}

In closing, I wish again to commend the Subcommittee for monitoring the Act's experiment in self-regulation. I hope that the process of dialogue initiated by these hearings will convince the federal judiciary that accountability and independence are not mutually inconsistent and that, to the contrary, the best assurance of a strong and independent federal bench is the confidence of an informed public.

Footnotes

1. 126 Cong. Rec. 28,093 (1980) (statement of Sen. DeConcini); id. at 28,617 (1980) (statement of Rep. Kastenmeier).
2. See, e.g., Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982); Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power, 11 Hofstra L. Rev. 997 (1983).
3. Burbank, Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U. Pa. L. Rev. 283 (1982).
4. Burbank, The Federal Judicial Discipline Act: Is Decentralized Self-Regulation Working?, 67 Judicature 183 (1983).
5. H.R. Rep. No. 1313, 96th Cong., 2d Sess. 4 (1980) (footnote omitted) (hereinafter cited as House Report).
6. 28 U.S.C. § 372(c)(11) (1982).
7. Id. See also 28 U.S.C. § 331 (1982) ("The Conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title.").
8. House Report, supra note 5, at 1.
9. According to the information available to me, only four councils (in the Third, Eighth, Ninth and Tenth Circuits) have amended their rules. With the exception of the amendments in the Third Circuit, they can fairly be described as minor.
10. Burbank, supra note 4, at 189. See also Burbank, supra note 3, at 314.
11. Burbank, supra note 3 at 323 (footnote omitted). See also Burbank, supra note 4, at 191.
12. Ranii, A Judge's Public Battles, Nat'l. L. J., July 23, 1984, at 34, col. 1.

13. Telephone interview with Hon. Ramsey Clark (Apr. 3, 1985).
14. Burbank, supra note 3, at 319 (footnote omitted). See also Burbank, supra note 4, at 189.
15. Burbank, supra note 3, at 329-30. See also Burbank, supra note 4, at 193.
16. Burbank, supra note 3, at 290 (footnote omitted).
17. Id. at 330. See also Burbank, supra note 4, at 194.
18. See Second Circuit Rule 0.24(i).
19. Fifth Circuit Rule 47.9.1.
20. See In re: Complaint of Judicial Misconduct, No. 84-372-001 (Jud. Conf. Comm. to Review Council Conduct and Disability Orders 1985).
21. Cf. 28 U.S.C. § 2077(b) (1982) (requiring courts of appeals to appoint advisory committees "for the study of the rules of practice and internal operating procedures").
22. The existing requirement, contained in 28 U.S.C. § 372(c)(15) (1982), applies only to orders "to implement any action under paragraph 6(B) of this subsection," that is, to orders entered following a special committee investigation. The Third Circuit Judicial Council has recently amended its rules to provide for public availability (and selected publication) of chief judge orders and orders of the Council on review petitions, with confidentiality preserved.
23. The existing requirement specifies only "a summary of the number of complaints filed . . . indicating the general nature of such complaints and the disposition of those complaints in which action has been taken." 28 U.S.C. § 604(h)(2) (1982).

Mr. KASTENMEIER. The Chair should note and request unanimous consent that this meeting today be covered in whole or in part by television broadcast and/or still photography pursuant to rule 5 of the committee rules.

Let us postpone our question of Professor Burbank until we've concluded with our second witness, who is Prof. Paul Rothstein, representing the American Bar Association.

Professor Rothstein.

Mr. ROTHSTEIN. Thank you very much, Congressman Kastenmeier.

You are to be commended, as is the entire committee and the Congressmen that are considering this question on this committee, for your foresight in foreseeing the importance of this issue and the importance of what is involved therein.

I should make it clear at the outset that I'm not giving my personal views but I am transferring to the committee the views on the subjects contained in H.R. 2633 that have been expressed by the American Bar Association; that is, by the 315,000 lawyer members of the ABA. And the way positions are arrived at in the ABA is through a multilayered, many-stepped, many-considerationed process that represents a great diversity of viewpoints. And these are expressed in policies and recommendations. And it is against these policies and recommendations that my testimony measures H.R. 2633, and the answer that we come up with in the American Bar Association is that H.R. 2633 is, indeed, a very, very good bill, a bill which we agree with virtually 90 percent or more. And my testimony will be extremely brief in support of H.R. 2633. It will be brief in time but it's the intensity that is very strong. We very much approve of H.R. 2633.

I would like to just run down, very briefly, the things that we do approve of and then the very few things that we do not approve of or that we feel could be improved in the bill.

No. 1, we agree that the Judicial Conference should play a very large role in the rulemaking process. Next, we agree that the Judicial Conference should publish its procedures, and very much strongly endorse that. We agree very much with H.R. 2633, that there should be a balanced cross-section of interested persons on the advisory committees and the various committees that are concerned with rules.

We heartily endorse the provision in H.R. 2633 that all meetings be open to the public with the exceptions provided in H.R. 2633. We support the idea that there should be minutes of all such meetings and that they should be available to the public. And, in addition, we support very much H.R. 2633's idea that there should be the opportunity to express minority views in the reports of the advisory committees.

We agree wholeheartedly with H.R. 2633 in providing a unified procedure whereby all rules of procedure and evidence should go through Congress. And we agree that Congress' role in approving or disapproving is properly stated in 2633. We agree that it should require a positive act of both Houses to make a change in rules submitted by the Supreme Court and the Judicial Conference.

There are a number of issues addressed by Professor Burbank in his fine statement and by H.R. 2633 on which the American Bar

Association has not taken a position; not because they approve or disapprove but because it has not gone through the American Bar Association process. But on the things I am speaking about, they have taken a position.

All right, now for the small handful of things wherein we feel H.R. 2633 could be improved.

It is the position of the American Bar Association that the Judicial Conference should have the ultimate responsibility for rules that will be transmitted to Congress, with, of course, Congress having the final say-so. And, therefore, we disagree with H.R. 2633 wherein it states that the Supreme Court has the final say-so before transmitting to Congress.

We have suggested—the American Bar Association has suggested—that membership on the advisory committees be for staggered terms and that there be only one reappointment for each person on advisory committees, for reasons detailed in the American Bar Association's more extensive statement, my printed testimony. This has not been fully carried out in H.R. 2633.

The American Bar Association would like hearings formalized, that the Advisory Committee hold hearings on proposed rules. That is not in H.R. 2633, although they are currently, under their procedures, holding hearings.

We feel that publication of drafts ought to be prescribed in H.R. 2633, that draft proposed rules ought to be widely disseminated, even more widely disseminated than the advisory committees are currently doing.

And, finally, we would like to see a provision in H.R. 2633 that would state that the time that Congress has to consider proposed rules may be extended only once by act of Congress, for reasons set out in our more detailed written testimony.

These are, as I say, only a handful of smaller changes that we feel could be made in H.R. 2633 in general, and in 90 percent of its thrust we are in agreement with the bill.

Thank you very much for giving me and the American Bar Association the opportunity to present this testimony.

The statement of Professor Rothstein area that had bothered—for which the committee had some concern, was whether the ultimate rulemaking authority in the judicial branch should be the Judicial Conference or the Supreme Court itself. I think we've taken the point of view that it should, perhaps, be the Judicial Conference, and had somewhat understood that the Supreme Court would acquiesce in that. However, we were disabused of that notion when we received a letter from the Chief Justice indicating that, and I quote him, that "one further area that had bothered—for which the committee had some concern, was whether the ultimate rulemaking authority in the judicial branch should be the Judicial Conference or the Supreme Court itself. I think we've taken the point of view that it should, perhaps, be the Judicial Conference, and had somewhat understood that the Supreme Court would acquiesce in that. However, we were disabused of that notion when we received a letter from the Chief Justice indicating that, and I quote him, that "on further reflection the Justices conclude it would be better to keep the ultimate authority for passing on rulemaking within the Court as it is now."

And, as a result, we did accede, at least in the formulation of this particular bill and last year, to that point of view, deferred to the High Court; although I consider it basic policy to have an open question whether or not the High Court has time or the structure for devoting itself as fully as the Judicial Conference might to this process.

I would invite your own comments on that. Perhaps, Professor Burbank, since you had not addressed that.

[The statement of Professor Rothstein follows:]



AMERICAN BAR ASSOCIATION

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STATEMENT OF
PROFESSOR PAUL F. ROTHSTEIN
CHAIRPERSON,
COMMITTEE ON RULES OF PROCEDURE AND EVIDENCE
CRIMINAL JUSTICE SECTION

ON BEHALF OF
THE
AMERICAN BAR ASSOCIATION

CONCERNING
H.R. 2633
RULES ENABLING ACT OF 1985

BEFORE THE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

June 6, 1985

Mr. Chairman and Members of the Subcommittee:

INTRODUCTION

My name is Paul Rothstein. I am a professor at the Georgetown University Law Center. I appear before you today on behalf of the 315,000 lawyers and judges of the American Bar Association to present to you the Association's views on the Rules Enabling Act. The Association's position on the Act is contained in a policy adopted by the ABA House of Delegates in February 1982. For the past three years, I have chaired the ABA Criminal Justice Section's Committee on Rules of Procedure and Evidence.

The Association would like to thank you for the opportunity to appear at this hearing. It believes the subject being considered, the judicial rule-making process, is very important. This is reflected not only in the ABA's 1982 policy on the Rules Enabling Act, but also by related positions taken in the ABA Standards Relating to Court Organization.

This hearing is a sequel to hearings held by this subcommittee during the 98th Congress. Those hearings were very productive and informative. They resulted in the drafting of H.R. 4144, which was subsequently revised and redesignated H.R. 6344. They prompted frank and open discussions concerning the judicial rule-making process. A greater insight into this process was provided. A public record was created concerning it.

This subcommittee is to be commended for continuing its review. The legislation being considered today is a product of compromise. It is much refined from its predecessor, H.R. 4144 of the 98th Congress. It does not wholly meet all the concerns expressed in the American Bar Association's 1983 policy. Nevertheless, it answers many of the concerns

expressed by that policy. More importantly, if enacted, it would measurably improve the judicial rule-making process. It is a bill that the ABA strongly supports.

HISTORY OF JUDICIAL RULE-MAKING

Before discussing the specific aspects of the judicial rule-making process, a brief overview of the history of federal judicial rule-making may be helpful. First, it is important to recognize that making the rules of federal court proceedings is a power of the Congress. That principle was recognized very early by the Supreme Court in Wayman v. Southard, 23 U.S. 1 (1825).

However, almost from the beginning, Congress delegated judicial rule-making authority to the courts. The earliest example of this delegation is found in Section 17 of the Judiciary Act of 1789. Through this provision of the Act the federal courts were authorized to establish their own rules. The Process Act of 1789, as subsequently amended in 1792 and 1793, also helped establish the tradition of judicial rule-making being exercised by the courts through a delegation of authority from the Congress. A series of subsequent Acts of Congress vested in the courts authority to prepare judicial rules to govern various proceedings, such as those involving admiralty, bankruptcy, criminal cases, and equity matters.

In 1934, Congress authorized the Supreme Court to draft civil rules. These rules were approved in 1938, obviating the need for rules in equity, since actions at law and equity were merged by the civil rules. In later years, the Supreme Court also acted on the basis of statutes passed by Congress to bring about modern rules of criminal procedure, appellate procedure and evidence.

In 1956, the Congress created the Judicial Conference of the United States. In 1958, it gave the Judicial Conference responsibility for studying the operation and effect of the general rules of practice and procedure and recommending changes and additions to those rules. Congress saw this as a means of providing the Supreme Court with "advice and assistance" on these matters.

Acting pursuant to this authority, the Judicial Conference now plays a major role in the judicial rule-making process. In fact, some observers have noted that the Supreme Court appears to have relinquished any first-hand participation in judicial rule-making and currently exercises only nominal authority in the process. It routinely receives the recommendation of the Judicial Conference concerning rule changes, and in a pro forma manner passes them on to Congress.

Several experiences prompted the American Bar Association to take an interest in the federal rule-making process. In 1979, Chief Justice Burger addressed the Association about the increasing work load of the judiciary. He stated that this increasing work load creates an important "...need to examine the powers exercised by the judiciary." He pointed out that often the judiciary is criticized for "...exercising powers not assigned to it by the Constitution." Although these remarks were not a direct call to examine the judicial rule-making process, the Chief Justice made specific reference to this need in his 1981 Year-End Report. Therein he stated, "In light of the Supreme Court Justices' ever-mounting burdens, it remains uncertain whether the Justices should set aside the time and effort required to examine proposed rules affecting the federal court system. I have suggested on earlier occasions that the rule-approving role of the Supreme Court -- whose members are much busier now than they were when the procedures were established over forty years ago -- merits examination."

This subcommittee's hearings during the 98th Congress provided examination. Moreover, the Justices of the Supreme Court were prompted to examine Congressional delegation of judicial rule-making. Their consideration of the matter resulted in the June 25, 1984 letter from Chief Justice Burger to Chairman Kastenmeier in which he stated, "...[T]he Justices conclude that it would be better to keep the ultimate authority of passing on rulemaking within the Court as it is now, but to allow the Court to defer to the decision of the Judicial Conference."

DEVELOPMENT OF ABA POLICY

The Association became keenly interested in the judicial rule-making process through its involvement with the consideration of what was to become Rule 26.2 of the Federal Rules of Criminal Procedure. The ABA House of Delegates adopted a policy placing the Association on record in opposition to this proposed Rule. In promoting that policy, first-hand experience was gained about the judicial rule-making process and its procedures.

As a result of that experience, the ABA Criminal Justice Section undertook a study of federal judicial rule-making. At the same time, the ABA Special Committee on Coordination of Federal Judicial Improvements also was engaged in an independent study of this subject. The reports of these two entities were completed at approximately the same time. The similarities in their recommendations was striking. As a result of these reports, the ABA House of Delegates adopted a policy in February, 1982 that was based on the report of the Criminal Justice Section, but which nevertheless incorporated the salient features of both reports. I would like to share with you our recommendations.

ABA POLICY ON DELEGATION OF JUDICIAL RULE-MAKING

The American Bar Association recommends that the Congress take the necessary action to formally provide for judicial rule-making authority to be delegated to the Judicial Conference of the United States. H.R. 2633 continues to vest this authority in the Supreme Court, and therefore does not mirror the Association's view on this issue. While the position taken by H.R. 2633 on this issue can be easily understood and respected -- particularly in view of the Chief Justice's June 25, 1984 letter -- it may be enlightening to review the reasoning that lead to the Association's position on this matter.

The conclusion that the rule-making process should be shifted from the Supreme Court to some other body was based on a number of factors. First, to the extent that it could be determined, it appears that the Supreme Court presently participates in the rule-making process in only a nominal way. It seemed logical that the applicable statutes be amended to reflect the prevailing rule-making practice as it is actually conducted. Secondly, this would be a way of decreasing the responsibilities of the overburdened Supreme Court without impairing judicial efficiency or the rights of litigants. Thirdly, it would resolve a longstanding controversy over the propriety of the Court deciding cases that involve challenges to rules that the Justices have previously approved. If rules were drafted and approved independent of the Court's participation, decisions on issues involving those rules that subsequently manifest themselves in cases before the Court would take on a greater appearance of objectivity and impartiality.

Once we felt that there exist cogent reasons for shifting the judicial rule-making authority, consideration had to be given to the question of what body should be the recipient of this responsibility.

The American Bar Association supports vesting this authority in the Judicial Conference. The Association supports this approach for a number of reasons. First, the Judicial Conference has been exercising this authority for twenty-seven years. During this time it has done an admirable job. Furthermore, it already has the administrative structure to continue this function. In addition, it has the research and staff capability of the Administrative Office of the United States Courts and the Federal Judicial Center to assist it in effectively and efficiently carrying out this function. Finally, this approach supports Standard 1.30 of the ABA Standards Relating to Court Organization. That Standard states, "Authority to formulate rules of procedure for all types of matters and proceedings in the courts should be vested in the court system..." The complete text of this Standard and its accompanying Commentary are attached (See appendix "B".)

BALANCED REPRESENTATION ON RULE-DRAFTING BODY

Proponents of vesting judicial rule-making in a newly created independent commission see this type of structure as fostering a high degree of independence on the part of the rule-promulgating authority. They stress the need for removing the process from the influence of judges and the Chief Justice, who presides over the Judicial Conference and appoints its committees.

The Association believes that it is not necessary to remove rule-making authority from the Judicial Conference in order to obtain a desirable degree of independence. We believe that the necessary independence can be achieved through prescribing certain membership criteria for the rule-drafting committees operating under the auspices of the Judicial Conference. The rule-drafting stage is perhaps the most critical stage of the process at which fundamental decisions are made.

To this end, the Association's policy urges that the Advisory Committees conducting the rule-drafting be "broadly representative of all segments of the legal profession." H.R. 2633 contains language to implement the spirit of this principle. The Association's policy also advocates that the members serve staggered terms during which the membership is gradually rotated. Persons should be eligible to be reappointed to a consecutive term only once. This method is seen as constantly bringing persons with new ideas and perspectives to serve on the rule-drafting committees.

H.R. 2633 does not contain these provisions relating to members' terms. We commend them to the subcommittee as elements that could help achieve a more independent drafting body.

OPENNESS IN THE JUDICIAL RULE-MAKING PROCESS

The American Bar Association policy also contains a number of recommendations intended to promote "openness" in the judicial rule-making process. Creating an atmosphere of "openness" is important in shaping the public's perception of the judiciary as an institution of our government. The public's belief that there is a need for openness for all institutions of government was heightened by the "Watergate" incidents. So many of the proceedings that surrounded that incident occurred in an air of secrecy that the public became naturally suspicious of any proceedings conducted outside the view of the public. In the public's eyes, the judiciary was the symbol of fairness in the "Watergate" incidents. For the judiciary to have compelled disclosure in so many instances in those cases, and yet to foreclose the public's access to its own rule-making proceedings has the potential of doing some violence to the public's image of our judicial system.

Some of the ABA recommendations on openness have already been implemented to some degree by the Judicial Conference. H.R. 2633 would formalize many of these practices and procedures and guarantee openness by statutory mandate.

The Association's 1983 policy calls for the publication of the procedures by which the Judicial Conference and its Advisory Committee conduct the judicial rule-making process. These procedures were published in September 1984. A copy is attached as Appendix "C."

They contribute to the bar and the public's understanding of the rule-making process. They help to clearly delineate for interested persons the opportunities that they have for making a contribution to the drafting of proposed rules. They also permit access to documents and records accumulated in the rule-making process. It is gratifying that H.R. 2633 would statutorily recognize the need for these published procedures.

The Judicial Conference currently publishes draft rules and circulates them to interested members of the bench and the bar. Although this achieves a certain degree of dissemination, the ABA policy suggests that a greater degree of access to proposed amendments could be achieved if they were published in appropriate publications that are circulated to persons and organizations likely to be interested in draft rules.

The policy makes no suggestions as to what might be appropriate publications. However, the Federal Register might be viewed as one possible candidate. Other likely sources are the various bar journals and legally oriented newspapers. In lieu of publishing the complete rule amendments, consideration might be given to widely publishing notice of their availability.

The Association policy supports the judicial rule-making authority holding public hearings on proposed rule changes. In recent years, the

Committee on Rules of Practice and Procedure of the Judicial Conference has held public hearings on proposed amendments to both the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure. The ABA Criminal Justice Section has participated by sending a representative to the hearings to present its views on the proposed amendments to the criminal rules. H.R. 2633 does not contain a requirement that public hearings be held on rule changes under consideration. The Subcommittee may want to recognize this practice by statutorily requiring it.

Public hearings have the advantage of allowing a dialogue between committee members and witnesses that appear before them. In addition, they serve the important function of enhancing the appearance of "openness." Although the hearings may not provide vast amounts of information that is not otherwise available or could not be provided through written comments, it is vital that the public perceive that the courts adhere to a policy of openness and are receptive to suggestions set forth in an open forum.

In addition to holding public hearings on proposed rule changes, it is important that meetings at which final reports are received and action is taken also be open to the public. H.R. 2633 contains a reasonable "open meetings" provision. Certainly there are times during the rule-drafting process when business must be carried out without the presence of "outside" individuals. As a practical matter, a certain amount of private discussions and negotiations must take place to enable the committee to launch a proposal. Public observation is not critical at this stage and will not materially add to the deliberations. In fact, it may have an inhibiting influence. The drafting committee must feel free to "float" proposals, frankly discuss them, and take appropriate action. Undoubtedly many ideas are considered at this stage that never become

"serious" proposals, and therefore have no potential of having an impact on the bench, the bar, and other interested persons.

H.R. 2633 has wisely provided a simple procedure for closing meetings when the committee believes it is appropriate. Since the reason for closing the meeting must be stated on the record, there is less likely a chance that the practice will be abused and that closed meetings will become a routine practice.

It is not expected that, as a practical matter, the presence of the public at meetings where reports are received and final action is taken will often have major impact on the decisions that are made. However, this is not its main purpose. It is intended to serve the important function of dispelling the negative connotations that attach to any governmental decision that is made "behind closed doors." Open meetings also permit the public to be privy to discussions that are dispositive of proposed amendments.

The ABA sees the maintenance of minutes by the rule-making authority to be an important practice. The "Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure" published in September 1984 provide for minutes to be kept by the Advisory Committees and the Standing Committee. H.R. 2633 also requires that minutes be kept.

Minutes are particularly helpful in early stages of the rule drafting process when the proceedings are most likely to be closed to the public. Of course, it is important that the minutes then be available to the public. Both H.R. 2633 and the Judicial Conference's procedures provide public access to the minutes. This should alleviate one of the main criticisms that has been cited as an example of a characteristic that gave judicial rule-making a secret aura.

Finally, we suggest that a procedure be instituted to provide for filing minority reports expressing dissenting views to concepts incorporated into proposed rule changes. H.R. 2633 contains such a provision.

The general availability of minority views would be helpful in highlighting areas of disagreement, and thereby preserve a record of positions that were considered and rejected. They would be of assistance to persons doing research on the rules and could become an important tool for court interpretation of decisions made by the Judicial Conference on rule changes. Furthermore, if broadly representative committees are formed, there may become an increasing need for minority opinions, as decisions on rule changes become less homogenized.

THE ROLE OF CONGRESS IN JUDICIAL RULE-MAKING

The ABA policy also contains recommendations as to the role of Congress in the judicial rule-making process. That policy supports the continued review of proposed rules by Congress. Furthermore, it states that Congress should have the opportunity to amend proposed rules.

While H.R. 2633 provides for rules to be submitted to Congress, it does not clearly indicate whether Congress can amend the rules that are submitted, although the broad language "unless otherwise provided by law" contained in §2874(a) may contemplate a Congressional amending process. If Congressional authority to amend rules, is contemplated, it may be prudent to state this fact clearly.

The ABA policy also specifies that amendments by Congress to proposed rules that are submitted to it should be accomplished by legislation approved by both Houses. Presently, in the case of the Federal Rules of Evidence, either House is empowered to disapprove a proposed rule by passing a resolution. This unilateral authority to disapprove a proposed

rule is tantamount to a one-House amendment to delete an entire rule.

It may also be useful to clarify that amendments to rules, as well as entirely new rules, are subject to Congressional review. The language presently contained in the bill calls for sending the rule to Congress when it is "prescribed." There may be some doubt as to whether this requirement relates solely to completely new rules, or also embraces amendments to existing rules. A minor change in the language could alleviate any confusion.

The ABA policy suggests certain limitations be made to the existing process of Congressional review and amendment. The review period should be for a period of 180 calendar days. H.R. 2633 contains a similar review period.

The ABA policy, however, contains an additional provision not included in H.R. 2633. It would specify that this time period should be permitted to be extended by Congress only once. A limitation on extending the time for review is suggested so that Congress cannot indefinitely continue to delay the effective date of rule amendments. Unless Congress acts within the permitted time (or a reasonable extension thereof), the amendment should take effect.

The Association policy also asks that Congress take a look at all aspects of the procedure surrounding the submission of judicial rules to Congress and the procedures for their review and approval. In many instances these procedures lack uniformity. Presently, there is not uniformity as to: (1) what rules are submitted to Congress, (2) the time when they are required to be submitted, (3) the manner in which Congress may effect changes or reject rules, and (4) the time provided for Congressional review.

There appears to be no reason for the variation in the procedures that apply to various types of rules. The only explanation seems to be

that the "Rules Enabling Act" is actually a series of statutory provisions that have been enacted in a piecemeal fashion over a period of years.

Until now, no comprehensive revision of the Act has been undertaken to reconcile these meaningless incongruities. H.R. 2633 tackles this persistent problem and resolves it.

CONCLUSION

I again thank you for the opportunity to appear and present the American Bar Association's views on this important subject. It is hoped these remarks have been helpful. The ABA has a keen interest in the judicial rule-making process and actively participates in it when the opportunity arises.

Just this past week, the ABA Criminal Justice Section transmitted to the Advisory Committee on the Federal Rules of Criminal Procedure of the Judicial Conference a memorandum recommending changes to those Rules. This document detailed amendments that should be considered in light of the enactment of the Comprehensive Crime Control Act of 1984. It was prepared at the request of the Judicial Conference Advisory Committee's Chairman, Judge Frederick B. Lacey.

Judge Lacey's invitation to submit these comments is a welcome indication of willingness to involve outside groups in the very early stages of the rule drafting process. It is a commendable gesture on the part of Judge Lacey.

It is sincerely hoped that Judge Lacey's openness and also these hearings will lead to an improved judicial rule-making process that benefits all persons who participate in or come in contact with our federal judicial system.

I would welcome the opportunity to answer any questions that the Subcommittee might care to ask.

APPENDIX "A"

AMERICAN BAR ASSOCIATION POLICY
ON THE
RULES ENABLING ACT

The Section's second recommendation (Report No. 118B) was amended by the Section, supported by the Special Committee on Coordination of Federal Judicial Improvements which withdrew its own recommendation (see page 3) on the same subject, and then approved by voice vote. As approved, it reads:

Be It Resolved, That the American Bar Association supports changes in the relevant statutes and procedures applicable to the process of adopting rules of evidence and procedure for use in the federal courts to be in conformity with the following principles:

I. The delegation of rule-making authority should be granted by Congress to the Judicial Conference of the United States.

II. The Advisory Committees of the Judicial Conference that perform rule drafting functions should be broadly representative of all segments of the legal profession, including judges, prosecutors, defense lawyers, legislators, law professors, and other lawyers who participate in a meaningful way in the area which is affected by the rules under consideration. The members of these Advisory Committees should be appointed for a term of a specified period of time. At the expiration of the term, the members should be eligible to be reappointed to a consecutive term only once. The expiration of the members' terms should be staggered, so that the membership of the committees is gradually rotated.

III. The Judicial Conference and its Committees should promote openness in the rule-making process and the procedures utilized in this process by:

A. Publishing the procedures by which the Judicial Conference and its Committees conduct the rule-making process.

B. Publishing, as early as possible, copies of draft rules and also any major changes that have been made to previously published draft rules. They should be published in appropriate publications circulated to persons likely to be interested in the draft rules and also distributed to persons and organizations who are likely to have an interest in the draft rules.

C. Holding public hearings on all draft rules and also on major changes that have been made to previously published draft rules. These public hearings should be announced in advance by notice in appropriate publications within a sufficient time prior to the hearing. The notice should solicit public comment on the proposed rules and invite interested persons to appear and testify at the public hearing.

D. Maintaining minutes of their proceedings. These minutes should be available to all interested persons.

E. Opening to the public meetings when final reports on proposed rules are received, and action is taken on these reports.

F. Permitting members to file minority reports in disagreement with the final report that is adopted. Minority reports should be appended to the final report that is adopted.

IV. Proposed rules should be submitted to Congress by the Judicial Conference so that Congress may review them and have an opportunity to amend them, if desired, prior to their taking effect. This review process should be uniform for all rules and provide at least 180 calendar days for Congress to engage in a meaningful review period once, for a specified limited number of days. Proposed rules should take effect unless they are disapproved or amended through legislation within the 180 day time period, or an extended period of review.

The following "Report" accompanied the the proposed Recommendation of the Criminal Justice Section to the ABA House of Delegates. This Recommendation was approved as ABA "policy," with certain modifications first being made to paragraph IV. The "Report" does not constitute ABA policy, however it serves to explain and provide supporting commentary to the policy.

REPORT

Scope of Recommendation

The Recommendation that is the subject of this report makes three proposals on matters pertaining to the Rules Enabling Act. The first advocates that the judicial rule-making responsibility that is currently exercised in a nominal manner by the Supreme Court of the United States be vested in the Judicial Conference. The Judicial Conference is the organization that does, in fact, now exercise this function. Secondly, the Recommendation articulates some fundamental concepts that would infuse the judicial rule-making process with procedural principles permitting greater participation by members of the legal profession. These concepts include measures to bring about broad representation

Congress has exercised this power by delegating its rule-making authority to the Supreme Court through the enactment of 28 USC §2071 (General Rule-making Power), §2072 (Power to prescribe rules in civil actions), §2075 (Bankruptcy rules), and §2076 (Rules of Evidence). The Supreme Court has been delegated the authority to make rules in criminal cases and proceedings by 18 USC §§3771 and 3772.

In practice, the Supreme Court does not take an active part in the drafting of court rules. It has given this responsibility to the Judicial Conference of the United States. In 1958 the Judicial Conference was given the responsibility by Congress to "carry on a continuous study of the operation and effect of the general rules of practice and procedure...prescribed by the Supreme Court for the other courts..." "...Changes in and additions to those rules...deemed desirable...shall be recommended by the Conference...to the Supreme Court for its consideration and adoption, modification or rejection..." (See 28 USC §331).

A Senate Report noted, "The proposed legislation does not change responsibility of the Supreme Court for prescribing rules of practice and procedure in Federal courts nor the responsibility for submitting some of them for congressional review. It does, however, by statute, permit the Supreme Court to secure the advice and assistance of an existing group which is uniquely qualified to give advice on these matters. The reality of the practice, however, has meant that the Supreme Court does not now prescribe the rules and only exercises nominal authority: judicial rule making for the federal courts.

Questions have been raised as to the propriety of delegating to the Court even this nominal authority. The manner in which that authority is in practice carried out has also been a source of controversy.

The arguments against continuing the present practice of delegating rule-making authority to the Supreme Court include the following:

1. "In 1944 Justice Frankfurter opposed the adoption of the Federal Rules of Criminal Procedure on the ground that the Supreme Court would be unable to evaluate them effectively in view of its distance from the realities of day-to-day district court trial proceedings."⁵ (See Rules of Criminal Procedure, Order, 323 U.S. 822 (1944) (memorandum of Frankfurter, J.)

4. Senate Report No. 1744, 85th Cong., 2d. Sess., reprinted in 1958 U.S. Code Cong. & Ad. News 3023, 3024

5. Weinstein, *supra* note 3 at 934

on the advisory committees of the Judicial Conference that exercise rule drafting responsibilities, and procedures to assure openness in the consideration of the rules by the Judicial Conference and its committees. Finally, it speaks to the role of Congress in federal judicial rule-making.

These three proposals do not address all issues that legal scholars have raised concerning the Rules Enabling Act and the general principles of judicial rule-making. They only seek to present a position on some matters that raise procedural concerns about the way in which judicial rules are drafted and adopted for the federal courts.

The question of the scope of matters that may properly be the subject of judicial rule-making is not considered by this report. It should be noted, however, that the commentary to Standards 1.30 and 1.31 of the ABA Standards Relating to Court Organization speak to the dichotomy of authority between the legislature and the courts over "procedural" matters and "substantive" rights. The Congress has also spoken to this issue by enacting an affirmative prohibition that states "...rules shall not abridge, enlarge or modify an substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."¹ It has also declared that a rule of court having the effect of making an "...amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress."²

Delegation of Federal Judicial Rule-making to the Judicial Conference

The rulemaking authority for federal courts rests ultimately with the Congress. This fact was recognized early in our nation's history. Mr. Chief Justice John Marshall writing in the case of Wayman v. Southard, 23 U.S. (10 Wheat.) 1 at 41-42 (1825) "...seemed to view the courts' rulemaking power as descending by specific delegation from Congress rather than deriving from an independent judicial authority to formulate procedural rules."³ More recently, the Court declared in Sibbach v. Wilson & Co., 312 U.S. 1 at 9-10 (1941),

"Congress has undoubted power to regulate the practice and procedure of federal courts and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States."

1. 28 USC §2072

2. Id.

3. Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905 at 927 (1976)

2. Justice Frankfurter also... "believed that it was undesirable for the Court to appear, through the issuance of rules, to prejudge issues that might come before it in litigation."⁶ (See Rules of Criminal Procedure, Order, 323 U.S. 821, 822 (1944).
3. "The secrecy which normally enshrouds the deliberations of the Supreme Court has given rise to another objection to its role in rulemaking. The legitimacy of rules, like that of any legislation, stems in large part from public access to the reasoning of the decision-makers; the Court's secrecy poses a threat to this legitimacy."⁷
4. "... (D)angers posed by congressional criticism of Court-made rules. Such criticism creates an unnecessary conflict between the Court and Congress and reduces the Court's prestige and reputation for unbiased independence."⁸

Recognizing that these criticisms may have some validity and being cognizant of the fact that the Supreme Court does not in reality directly exercise the rule-making authority it has been granted, the question arises as to who should exercise this authority. Scholars have proposed several alternatives.

The most logical alternative on the federal level is for Congress to formally designate the Judicial Conference of the United States as the rulemaking body. This is the alternative that is proffered by the Recommendation that is the subject of this Report. It is a logical choice. The Judicial Conference is, in fact, already exercising this function. It is experienced in these matters and has demonstrated its ability to discharge its responsibilities in an effective manner. Furthermore, the use of the Judicial Conference as the rule-making body conforms with the mandate of §1.30 of the American Bar Association Standards Relating to Court Organization. That Standard provides, "Authority to formulate rules of procedure for all types of matters and proceedings in the courts should be vested in the court system..."

The designation of the Judicial Conference as the rule-making body for the federal courts will not only preserve the judiciary's participation in the development of its own rules, but will minimize the contention that federal courts too readily accept the legal sufficiency of court

6. Id.

7. Id. at 936

8. Id.

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rules and demonstrate a reluctance to strike down these rules of court because they have been promulgated by the Supreme Court. The case of Hanna v. Plumer, 380 U.S. 460 (1965) is often cited as evidence of this judicial reluctance to find fault with court rules. Therein, it was stated "...the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."⁹

One of the other possible alternatives would be "an independent commission created by Congress with members chosen by leaders of the legislative and the judicial branches of government."¹⁰ This alternative was not chosen to be included in the Recommendation because it does not conform to ABA Standards and because of the concern that "...if Congress were to participate in the original drafting it might become too committed to a draft to exercise its power of review impartially."¹¹

Advisory Committees of the Judicial Conference

Paragraph II of the Recommendation that is the subject of this Report provides that Committees of the Judicial Conference that perform the rule drafting function should have a membership broadly representative of the segments of the legal profession, including judges, practitioners, law professors, legislators, and others which are affected by the rules under consideration. This proposal is made to assure the direct participation of members of the bench and the bar in the rule drafting process. It supports Section 1.30 of the ABA Standards Relating to Court Organization which provides, "The authority to promulgate rules of procedure may be vested in...a rule-making committee composed of judges, lawyers, legal scholars and representatives of the legislature." It also addresses a concern that the present "advisory committees" to the Rules Committee of the Judicial Conference do not currently provide the broad representation that is desirable. In addition to providing this broad representation, consideration should also be given to creating a membership that reflects minority groups that are increasingly joining the ranks of the legal profession.

9. 380 U.S. 460 at 471

10. Lesnick, The Federal Rule-Making Process: A Time for Re-examination, 61 A.B.A.J. 579 at 582 (1975)

11. Weinstein, supra note 3 at 941

This paragraph of the Recommendation also provides that the members of the advisory committees exercising rule drafting responsibilities should be appointed for a term of limited duration. In addition, it is suggested that the members' terms should be staggered to permit a rotation of the committees' membership. In this manner, the drafting committees would benefit from a regular change of membership that would inject new ideas and insight into the rule drafting process.

To some extent, this rotation of membership in conjunction with the broadly representative nature of the membership, would act to ameliorate the circumstances that have resulted in the observation that the committees are affected by a dominating influence that the present system gives to the Chief Justice.

The Judicial Conference is chaired by the Chief Justice. Its membership includes the chief judges of the eleven circuits, the Court of Claims, and the Court of Customs and Patent Appeals. In addition, a district judge from each of the eleven circuits is elected by the federal judges in the circuit to serve as a member of the Conference. In addition to chairing the Conference, the Chief Justice exercises authority over the rulemaking procedures of the Conference by appointing the members of the Conference's Committee on Rules of Practice and Procedure. It is this Committee, and the advisory committees of this Committee (also appointed by the Chief Justice), that draft the rules. It is probably a fair observation that, "(a)s a practical matter, there is now strong psychological pressure on individual advisory committee members to modify the rules as they think the Chief Justice would wish."¹² Ultimately, the Committee on Rules reports to the Judicial Conference, which is chaired by the Chief Justice; and the Judicial Conference then reports rule changes to the Supreme Court, which is also presided over by the Chief Justice. Paragraph II of the Recommendation is intended to minimize these criticisms by modifying the conditions that give rise to their applicability to the rule drafting Committees.

Openness in the Federal Judicial Rule-making Process

Paragraph III of the Recommendation that is the subject of this Report calls for openness in the federal judicial rule-making process. It enumerates a number of specific proposals to promote a more open and accessible process. These proposals are borne mainly out of the perceived flaws in the present process.

At the present time, although the Judicial Conference is responsible for formulating the rules of court, it has not "seen fit to publish procedural rules or even an informal statement describing its procedures."¹³

12. Id. at 941

13. Lesnick, supra note 7 at 580

Therefore, the procedure by which rules are proposed has never been formalized, and any description of that procedure is a recitation of the customary practice. By publishing its procedures, and the procedures of its Committees, the rule-making organization "...would enhance the awareness of interested persons and thereby facilitate their participation; it also would find itself required to face explicitly the question whether its procedures now provide adequate means for obtaining a broad range of input."¹⁴

The publication of draft rules as early as possible in the drafting stage is essential to permit outside groups to review the proposed rules and provide meaningful comment to them. Furthermore, when substantial changes are made to these draft rules, interested groups should be notified so that they can also provide comment on these changes. This notification requirement is in conformity with Section 1.31 of the ABA Standards Relating to Court Organization. That Standard provides, in part, "The authority (to prescribe rules) should be exercised through a procedure that involves use of advisory committees from the bar, notice to (emphasis added) and opportunity on the part of members of appropriate legislative committees, and the bar to suggest, review, and make recommendations concerning proposed rules."

Public hearings should also be an integral part of the rule-making process. In the past, although an opportunity may have been given for written comments to be submitted, no public hearings to receive oral testimony were held by either the advisory committee, the Committee on Rules of Practice and Procedure, the Judicial Conference, or the Supreme Court. Although it is the practice that written comments that are submitted are available for public inspection, this is not a satisfactory substitute for making a free and open public hearing available to the public.

Published minutes of the deliberations of the Committees engaged in rule-making proceedings would also promote openness and be an aid to persons interested in the formulation of the rules. At the present time, the proceedings of the advisory committees are recorded. However, these recordings are not usually transcribed; and even if they are transcribed, they are not available to the public.

The meetings of the Committees participating in the rule-making process should be open to the public at critical stages of the decision-making process. This does not mean that the public needs to be privy to all the deliberations undertaken. Indeed, there is more than adequate reasons why a body formulating rules may want to have closed meetings during certain initial formative stages of their proceedings. However, at a point where the decision-making process becomes more determinative and decisive, the public ought to be permitted to be present. This

14. Id.

concept is in keeping with the recommendation of Senator Ervin that "full sessions, when it receives committee reports and takes action on them, be open to the public and the press."¹⁵ (See *The Independence of Federal Judges, Hearing Before the Subcommittee on Separation of Powers, Senate Committee on the Judiciary, 91st Congress, 2d Sess., at 312 (1970)*).

Senator Ervin has also suggested that minority reports be prepared. This would serve the purpose of alerting "...interested lawyer and legislators that matters of controversy are being resolved."¹⁶ Currently, there is no means of determining what issues were in controversy among committee members or members of the conference when particular rules were being considered.

The Role of Congress in Federal Judicial Rule-Making

Paragraph IV of the Recommendation that is the subject of this Report maintains that Congress should retain authority to review and amend rules prior to their taking effect. Presently, Congress exercises authority to review most rules. Only procedure-after-verdict rules adopted pursuant to USC §3772 are not submitted to Congress for review.

"(T)he practice of submitting proposed court rules for congressional approval or modification seems altogether appropriate; such a process conforms to the basic tenets of delegation theory."¹⁷ The participation of Congress in reviewing court rules is in accordance with Section 1.31 of the American Bar Association Standards Relating to Court Organization. This Standard provides that there should be a procedure that involves an "...opportunity on the part of members of appropriate legislative committees, ...to suggest, review, and make recommendations concerning proposed rules." The Commentary to the Standard further states "The legislature... (has) a legitimate concern with procedural policy, and the legislature, as the popularly elected representative of the community as a whole, should have the opportunity to participate in determining what the policy should be."

The Recommendation provides that the review process should be uniform. The provision for uniformity is prompted by the variation in the Congressional review process and the observation that "(t)here is no persuasive reason why all this national rulemaking power should not be

15. Id.

16. Id.

17. Weinstein, supra note 3 at 927

exercised in the same way and be subject to the same control by Congress."¹⁸

The time period provided for Congressional review of court rules is one aspect of the process that is not currently uniform. As previously stated, no Congressional review is provided for procedure-after-verdict rules. Rules of Evidence must be reported to Congress not later than the May 1 following the beginning of a regular session of Congress, and take effect 180 days after they have been so reported. Other rules (criminal rules, see 18 USC §3771; civil rules, see USC §2072) take effect 90 days after they are reported.

The Recommendation specifies a 180 day period of review. The 180 day period is in keeping with the view of Howard Lesnick that "A doubling of the ninety-day period of delay in effectiveness would certainly be warranted..."¹⁹ This suggestion is made because of the inadequate time 90 days provides for meaningful review.

Recognizing that in some cases 180 days may also be inadequate, the Recommendation provides for an extension of this time period. However, the extension may be made only once, and then only for a specified limited period. This extension may be made by either the House of Representatives or the Senate acting unilaterally. The one-time extension for a specified limited period is designed "to prevent delay from being used not merely to permit decision but to embody it."²⁰

Another aspect of the present system that lacks uniformity is the manner in which Congress can effect a modification to rules that are submitted for its review. Rules of Evidence may be rejected by a resolution passed by either the House or the Senate; whereas the rejection or modification of procedural rules requires the passage of a bill by Congress and the signature of the President.

This Recommendation provides for disapproval of proposed rules or amendment of these rules by Congress. Such a provision is logical. The purpose of submitting proposed rules and changes to existing rules to Congress is to permit them to review them. If this review is to be

18. Weinstein, supra note 3 at 939

19. Lesnick, supra note 7 at 583

20. Id.

meaningful, Congress must retain the authority to act in accordance with the findings resulting from the review it conducts.

Respectfully submitted

Sylvia Bacon
Chairperson
Criminal Justice Section

January, 1982

APPENDIX "E"

AMERICAN BAR ASSOCIATION STANDARDS

RELATING TO

COURT ORGANIZATION

(STANDARD 1.30)

AMERICAN BAR ASSOCIATION COMMISSION ON
STANDARDS OF JUDICIAL ADMINISTRATION

STANDARDS RELATING TO

Court Organization

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1974

COMMISSION ON STANDARDS
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1.30 Rule-Making, Policy-Making, and Administration: General Principle. Authority to formulate rules of procedure for all types of matters and proceedings in the courts should be vested in the court system, under arrangements in which the legal profession and the public have an opportunity to participate. The court system should control its own administrative policies and should have procedures through which all

its judges can participate in developing such policies. Authority to implement the courts' administrative policies should be established in a clear and simple set of management relationships under the supervisory authority of the chief justice.

The authority to promulgate rules of procedure may be vested in the members of the state's highest court or in a rule-making committee composed of judges, lawyers, legal scholars and representatives of the legislature. Authority to promulgate administrative policy should be vested in a judicial council composed of judges from various courts within the system or of the members of the supreme court sitting as a judicial council. The judicial council should act as an advisory committee to the chief justice concerning matters of administration. All judges in the court system should convene regularly as a body to deliberate upon and discuss the work of the court system and their problems and responsibilities in its administration.

1.31 Rule-Making Authority. A court system should have authority to prescribe rules of procedure, civil and criminal. The authority should extend to all proceedings in all courts in the system and should include all aspects of procedure. The authority should be exercised through a procedure that involves use of advisory committees from the bar, notice to and opportunity on the part of members of appropriate legislative committees, and the bar to suggest, review, and make recommendations concerning proposed rules. The rule-making body should have staff assistance for research and drafting.

Commentary

It is generally recognized that the courts should have authority to prescribe rules of procedure governing judicial

proceedings. Comprehensive rule-making authority exists in most state court systems and in the federal courts, and more limited authority has been conferred on the courts in most other jurisdictions. The rule-making authority goes beyond and involves somewhat different considerations than the authority to prescribe administrative policy for the courts, which is provided for in Section 1.32. The power to prescribe administrative policy is essentially a matter of internal concern to the court system, and is therefore unqualifiedly an inherent judicial power. Procedural rules, however, have broader effects and should be the product of a more widely reaching process of deliberation and decision. The legislature and the bar have a legitimate concern with procedural policy, and the legislature, as the popularly elected representative of the community as a whole, should have the opportunity to participate in determining what the policy should be. It is especially important that the rule-making power be exercised with prudent and diplomatic regard for legislative concern about matters of general public interest, even as to matters that might technically be deemed "procedural."

There are various procedures by which the views of the legislature and of the bar may be brought to bear in procedural rule-making. The procedure used in many states is as follows: The supreme court establishes drafting committees composed of judges, lawyers, and legal scholars, assisted by a staff; the committees prepare, publicly circulate, revise, and finally propose rules and rule changes; the court considers and if necessary revises the proposals and then promulgates them as rules of court. Another successful procedure, used in such states as California, involves a rule-making body that is composed of judges of various courts, lawyers, legal scholars, and representatives of the legislature. The rule-making body, assisted by staff, drafts and circulates rule proposals, makes revisions if necessary in light of responses to the circulation, and then promulgates the

rules or rule changes. The procedure in the federal system has also proved very successful. A rules committee consisting of judges, lawyers, and legal scholars is established by the supreme court; the committee drafts and circulates rule proposals and submits them for approval by the court; if the court approves them, they are submitted to the legislature for review; if the legislature does not reject them, they become effective.

The essential features of a balanced and effective rule-making procedure are the participation of judges, lawyers, legal scholars, and legislators in deliberations concerning the rules the provision of staff assistance for research and drafting and public circulation of proposals for review and comment before their adoption. By means of such a procedure, primary responsibility for procedural rules rests with the court system. The judiciary has special familiarity with the problems of applying and enforcing rules of procedure; it can give attention more promptly and intensively than the legislature to problems of procedure as they arise, and it may be less susceptible to the influence of special interests that would oppose or promote procedural change. The judiciary is also able more freely and easily to enlist the help of specialists in litigation among the bar in formulating procedural rules.

The scope of the rule-making authority should extend to all types of rules that may appropriately be called "procedural" as distinct from "substantive." This includes both civil and criminal rules, and can include rules of evidence, in all courts in the system. There is no distinct boundary between "procedural" rules and rules of "substantive" law, just as there is none between "procedural" rules and court administrative regulations. See the Commentary to Section 1.11(d). Judicial exercise of the rule-making power should not encroach on the legislature's supremacy in matters of substantive law, but the difficult question is how to

identify and preserve this division of responsibilities. All procedural rules have some effects, often very significant ones, on the enjoyment of substantive rights. Hence, all procedural rules have substantive legal implications. At the same time, because substantive legal rules ordinarily imply the possibility of enforcement by judicial procedures, almost all substantive law has procedural implications.

These interconnections make it impossible to define the scope of the rule-making power in precise and enduring terms. Furthermore, some clearly procedural rules are of such great general significance that they should not be modified except by a procedure, such as legislation or constitutional revision, that involves general political assent. The right to jury trial, for example, is in this category.

The proper boundaries of the rule-making power must therefore be worked out by processes that go beyond strict legal definition. One of these processes is reference to legal tradition and precedent. In any particular jurisdiction, many types of rules that could be categorized as either substantive or procedural have long been regarded as in the province either of the legislature or of the courts. Thus, statutes of limitations and rules regarding survival of causes of action have been treated as substantive and therefore subject to legislative mandate, while rules of discovery have been treated as procedural even though they may involve very sensitive questions of public policy. Due recognition of historical categorizations such as these permits accommodation of the legislative and judicial spheres of authority without a general definition of the boundary between them. Another process for determining the boundary between substance and procedure involves one form or another of consultation and joint deliberation. This can be achieved through such mechanisms as law-revision commissions and *ad hoc* study committees and commissions, in which representatives of the legislature, the bar, and the judiciary are participants.

References;

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APPENDIX "C"

PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE
JUDICIAL CONFERENCE COMMITTEES ON
RULES OF PRACTICE AND PROCEDURE

**PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE
JUDICIAL CONFERENCE COMMITTEES ON
RULES OF PRACTICE AND PROCEDURE**

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice and procedure and amendments to existing rules.

Part I - Advisory Committees

1. Functions

Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. Each Advisory Committee shall submit to the Standing Committee its recommendations for rules changes.

2. Suggestions and Recommendations

Suggestions and recommendations with respect to the rules should be sent to the Secretary to the Standing Committee, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall acknowledge in writing every written suggestion or recommendation so received and refer all suggestions and recommendations to the appropriate Advisory Committee. The Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

- a. An Advisory Committee shall meet at such times and places as the Chairman may authorize.
- b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.
- c. The Advisory Committee shall then consider the draft proposed new rules and rules amendments, together with the Committee Notes, make revisions therein, and submit them to the Standing Committee, or its Chairman, for approval of publication.

4. Publication and Public Hearings

- a. When publication is approved, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally, for comment to be made to the Advisory Committee. Distribution shall be as wide as possible and shall include the Chief Justice of the highest court in each State and all individuals or organizations that request copies of proposed rules changes. The Secretary shall also send copies to appropriate legal publishing firms with a request that the proposed rules changes be included in their publications.
- b. In the light of the time required to permit full consideration of proposed rule changes by bar associations, circuit judicial conferences and other interested groups, a period of at least six months shall normally be allowed for public comment.
- c. An Advisory Committee shall normally conduct public hearings on all proposed rules changes after adequate notice and at such times and places as shall be determined by the Chairman. The proceedings shall be recorded and a transcript shall be prepared for the Committee's use. The transcript shall be available to the public at the Administrative Office of the United States Courts.

- d. Exceptions to the time for comment and public hearing requirements of this paragraph may be granted by the Standing Committee, or its Chairman.

5. Subsequent Procedures

- a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public comment may be provided.
- b. The Secretary to the Standing Committee, in consultation with the Chairman of the Advisory Committee, shall advise every person who has commented on a proposed rules change of the Advisory Committee action thereon.
- c. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

- a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.
- b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the

United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

- c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

- a. The Standing Committee shall meet at such times and places as the Chairman may authorize.
- b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.
- c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.
- d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

- a. The Secretary shall prepare minutes of all Standing Committee meetings.
- b. The records of the Standing Committee shall consist of the minutes of Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.
- c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Mr. BURBANK. Thank you. In my comments on the previous bill, H.R. 4144, I suggested that although the role of the Supreme Court as rule promulgator entails certain costs, including the appearance of prejudice and the possibility of harm to the institution, friction with Congress, changes in the infrastructure and process of supervisory court rulemaking, such as, I believe, H.R. 2633 contains, should diminish those costs. I also suggested that attention to the limits of the rulemaking power under the Enabling Acts would diminish them further.

In addition, I raised in that letter commenting on H.R. 4144 the question whether rules promulgated by the Judicial Conference or some other body would command the same respect within the Federal system as rules promulgated by the Supreme Court, and, moreover, would attract emulation by the States so as to foster national uniformity. Since I submitted those comments, as you pointed out, the Court has changed its view on the issue and the Conference of Chief Justices has gone on record very strongly in favor of keeping the rulemaking power in the hands of the Supreme Court; although it does not oppose, I take it that the Court does not oppose, the authority to delegate their own authority to the Judicial Conference.

In the circumstances I believe that the prudent course is to leave matters where they lie, although, again, I think it would be quite consistent with the Chief Justice's last letter, as well as with the views of the Conference of Chief Justices, to change the language to enable the Court, if it so chose, to delegate to the Judicial Conference. As I read the Chief Justice's letter, what he is saying is:

On most occasions we are, in fact, going to defer to the Judicial Conference; we simply want the ability where we think it's really important to exercise a further layer of review.

The wishes of the Court, it seems to me, should not lightly be disregarded; particularly because, notwithstanding the few cases the Supreme Court has decided, discussing the question of rulemaking, the constitutional framework of supervisory rulemaking remains murky at best. This bill should go far, as I suggested, in reducing the costs of the Court's involvement, and the Judicial Conference would only be another rubber stamp. I think we have to recognize that as a practical matter. And it is not one that, aside from numbers, is more obviously, broadly representative than the Supreme Court, itself. So, my view would be to leave it as it is in H.R. 2633 or change the language to authorize the Court to delegate, if it so chose, to the Judicial Conference.

I agree with you, as a policy matter one could reasonably go either way, but to avoid friction with the Court in this area I think Congress would best accede to its wishes.

Mr. KASTENMEIER. Professor Rothstein, do you have any further comment on the issue?

Mr. ROTHSTEIN. It is a very close question, but let me make you privy to the American Bar Association's thinking on this.

We supported all the power being in the Judicial Conference without the Supreme Court putting its imprimature on it, because we felt that is an actuality, what happens anyway, and that it is a sham to say that the Supreme Court is really doing it. And our

second reason was that questions arise as to the propriety of the Supreme Court ruling in subsequent cases on rules that it has already approved, at least in form, in a general way. And whether those are well founded or ill founded questions that arise in the public's mind, they do arise, and, therefore, we thought that making the Judicial Conference the final authority before Congress was the best way to take care of those two problems.

Mr. KASTENMEIER. I'd like to yield to my colleague, the gentleman from Illinois.

Mr. HYDE. Well, I thank you, Mr. Chairman. We do have some questions prepared, but I think the statements covered most of the material. So, I won't prolong this hearing by asking them, but I defer to your leadership on this issue.

Mr. KASTENMEIER. I thank my colleague.

I would ask Professor Rothstein if the ABA has a position on whether the supersession language from current law states that rules—congressionally enacted statutes—should be removed, as is done in this bill, or not.

Mr. ROTHSTEIN. The ABA has not taken a position.

Mr. KASTENMEIER. May I ask you, for political edification, whether or not the ABA has debated or discussed the issue.

Mr. ROTHSTEIN. No. It has not; there's no implication to be read.

Mr. KASTENMEIER. Nothing to be drawn one way or the other.

I would say to others, I suppose, that I don't—not to suggest that the Congress has any ultimate wisdom. I've often felt uncomfortable with the role of Congress in reviewing rules. But I think it has more to do with our Federal system as constituted and whether ultimate conflicts in this area, how they might best be resolved, notwithstanding whether one has used an amorphous body of 455 House Members and 100 Senators as having superior, ultimate wisdom with respect to rules, and as to whether statute ought to be countermanded to promulgation of rules. That is basically the policy decision which went into this, I think, rather than other implications to be drawn.

One issue that was raised, as I recall, is in light of adoption of the substance of Federal rules, particularly of civil procedure. Should Congress mandate the appointment of representatives of State courts and various advisory committees, or should we leave well enough alone?

Do you have any particular view?

Mr. ROTHSTEIN. My personal thought, outside what the ABA thinks—It has expressed no opinion on this. My personal thought would be that it would be a very good idea to have members of the State court present in a nonvoting capacity. In my experience with my work on the ABA, State court judges and State court lawyers have made enormous contributions, because they show a diversity of viewpoint that those of us who practice only before Federal courts and are concerned only with the Federal courts didn't realize existed. And the States are a tremendous laboratory for the marketplace of competing ideas. And since States are expected to and do follow the Federal rules, and enact them, and adopt them themselves later on, it would be very good for their viewpoint to be reflected.

I do have a little trouble with State court people actually voting on what the rules would be for the Federal courts, but their input would be enormously helpful.

Mr. KASTENMEIER. Perhaps I ought to also ask you, Professor Rothstein, about the prospect of this bill in terms of its stated goals of including the rulemaking process. Do you think it would, as I think Professor Burbank has stated he thought it would, parenthetically have the effect of diminishing for congressional intervention.

Mr. ROTHSTEIN. For congressional intervention, yes. For congressional oversight, I think no; I think there is a need. But yes, I think so. I agree with that.

Mr. KASTENMEIER. If the gentleman from Illinois has no further questions, I will only make an observation. I got the impression that openness of the rulemaking process, at least as far as the Judicial Conference is concerned, and which was resisted by the Judicial Conference and may still be as far as I know, is more of a moot question at this point, that you perceive less objection to opening up the rulemaking process in terms of its openness to the outside as opposed to past practices.

Do you both, on the openness question, have any feel whether that is still a contentious matter?

Mr. ROTHSTEIN. Well, the Judicial Conference has gone a long way in accommodating the forces for openness, but they haven't gone all the way. And some of it is mentioned in our printed testimony. And I think H.R. 2633 opens it up even more. And, in addition, I think it is a good idea to have it memorialized or mandated in legislation, because judicial conferences can come and go and ideas can change.

This is not to say that the Judicial Conference has not made long strides in this area; it really has. And, quite personally, I have no personal quarrel at all with what they are doing. But the American Bar Association does feel that it should be memorialized in legislation and it should be opened up a bit more. And I think you are correct, that at least the present Judicial Conference seems to have recognized that this is the direction to go.

Mr. BURBANK. If I may speak to that.

Mr. KASTENMEIER. Professor Burbank.

Mr. BURBANK. I would be very surprised if the Conference regards this as a vote issue. As I understood their position on previous bills, the two relevant positions were: One, opposition to prescribing in legislation certain procedures that are prescribed and were prescribed in the antecedent bill; but, more than that—And I didn't regard that as terribly important, given what they did during this process, namely to publish their own procedures, and I do not believe that they are lightly going to depart from those, so I'm not worried about that. And, of course, the bill contains a requirement that they publish their procedures, so if they do propose to depart from them people will know about it.

Where I think the Judicial Conference will continue to have a great deal of trouble—and I must say, and I alluded to this in both my prepared statement and in my summary statement earlier, I think I share some of the concern—is the requirement of open

meetings. I am one of those people who believes that there is a point at which openness becomes hypocrisy.

I worry a little bit about assimilating the rulemaking process too much to the legislative process. It is my personal view that notice and comment rulemaking with response to comments and public hearings is more than adequate for this process to be publicly accountable. I am concerned particularly because it's not clear to me that this bill will effect an equation between the rulemaking process and the legislative process. That is to say, this bill may be requiring more openness of the rulemakers than Congress has imposed upon itself.

The analogy was made by Judge Gignoux, and I think it may be an accurate one, that at least before there is a concrete proposal published for comment, for instance, a proposal for a rule, the proper analogy is staff work by the staff of a Congressman or Senator. And if that's the case, then it would seem to me, if one is going to go this way, one would do what the ABA—in fact, the ABA policy, as I understand it from 1982—proposed, which is to require openness only at a certain point, and that point would presumably be, once a proposed rule has been published for comment and at a time when action is going to be taken in light of those comments.

I would imagine that the Judicial Conference, even though I doubt that they would approve of that, would have less difficulty in terms of the stated objections of Judge Gignoux and others, with that degree of openness. And personally, I think it would be preferable to what you have in the bill. That's the major area where I disagree, but I didn't testify on it because my views are already reflected in the hearing record, and I take it the subcommittee holds a different view.

Mr. KASTENMEIER. I appreciate those remarks because they are helpful in judging the disposition of this question. And, indeed, we may be balancing out objectives.

In any event, in behalf of the subcommittee we wish to thank you both, Professor Burbank and Professor Rothstein, for your testimony today and your help in the past on this issue.

It is my expectation the Congress will be able to move on this shortly. With Congressman Hyde's and other of my colleagues' active interest we should be able to resolve this, certainly in the 99th Congress. We will be having a subsequent hearing on the subject.

Thank you both for your testimony today.

The subcommittee stands adjourned.

[Whereupon, at 2:51 p.m. the subcommittee was adjourned.]

99TH CONGRESS
1ST SESSION

H. R. 2633

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 1985

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Rules Enabling Act of
5 1985".

1 SEC. 2. RULES ENABLING ACT AMENDMENTS.

2 (a) IN GENERAL.—Title 28 of the United States Code
3 is amended by striking out section 2072 and all that follows
4 through section 2076 and inserting in lieu thereof the follow-
5 ing:

6 “§ 2072. Rules of procedure; power to prescribe

7 “(a) The Supreme Court shall have the power to pre-
8 scribe general rules of practice and procedure (including rules
9 of evidence) for cases (including all bankruptcy matters) in
10 the United States district courts (including proceedings before
11 magistrates thereof) and courts of appeals.

12 “(b) Such rules shall not abridge, enlarge, or modify any
13 substantive right or supersede any provision of a law of the
14 United States.

15 “§ 2073. Rules of procedure; method of prescribing

16 “(a)(1) The Judicial Conference shall prescribe and pub-
17 lish the procedures for the consideration of proposed rules
18 under this section.

19 “(2) The Judicial Conference may authorize the ap-
20 pointment of committees to assist the Conference by recom-
21 mending rules to be prescribed under section 2072 of this
22 title. Each such committee shall consist of a balanced cross
23 section of bench and bar, and trial and appellate judges.

24 “(b) The Judicial Conference shall authorize the ap-
25 pointment of a standing committee on rules of practice and
26 procedure under subsection (a) of this section. Such standing

1 committee shall review each recommendation of any other
2 committees so appointed and recommend to the Judicial Con-
3 ference rules of practice and procedure and such changes in
4 rules proposed by a committee appointed under subsection
5 (a)(2) of this section as may be necessary to maintain consist-
6 ency and otherwise promote the interest of justice.

7 “(c)(1) Each meeting for the transaction of business
8 under this chapter by any committee appointed under this
9 section shall be open to the public, except when the commit-
10 tee so meeting, in open session and with a majority present,
11 determines that it is in the public interest that all or part of
12 the remainder of the meeting on that day shall be closed to
13 the public, and states the reason for so closing the meeting.
14 Minutes of each meeting for the transaction of business under
15 this chapter shall be maintained by the committee and made
16 available to the public, except that any portion of such min-
17 utes, relating to a closed meeting and made available to the
18 public, may contain such deletions as may be necessary to
19 avoid frustrating the purposes of closing the meeting.

20 “(2) Any meeting for the transaction of business under
21 this chapter by a committee appointed under this section
22 shall be preceded by sufficient notice to enable all interested
23 persons to attend.

24 “(d) In making a recommendation under this section or
25 under section 2072, the body making that recommendation

1 shall provide a proposed rule, an explanatory note on the
2 rule, and a written report explaining the body's action, in-
3 cluding any minority or other separate views.

4 “(e) Failure to comply with this section does not invali-
5 date a rule prescribed under section 2072 of this title.

6 **“§ 2074. Rules of procedure; submission to Congress; ef-
7 fective date**

8 “(a) The Supreme Court shall transmit to the Congress
9 not later than May 1 of the year in which a rule prescribed
10 under section 2072 is to become effective a copy of the pro-
11 posed rule. Such rule shall take effect no earlier than Decem-
12 ber 1 of the year in which such rule is so transmitted unless
13 otherwise provided by law. The Supreme Court may fix the
14 extent such rule shall apply to proceedings then pending. The
15 Supreme Court shall also transmit with such proposed rule
16 proposed amendments to any law, to the extent such amend-
17 ments are necessary to implement such proposed rule or
18 would otherwise promote simplicity in procedure, fairness in
19 administration, the just determination of litigation, and the
20 elimination of unjustifiable expense and delay.

21 “(b) Any such rule creating, abolishing, or modifying an
22 evidentiary privilege shall have no force or effect unless ap-
23 proved by Act of Congress.”.

24 (b) **ADVISORY COMMITTEES FOR COURTS.**—Section
25 2077(b) of title 28, United States Code, is amended—

1 (1) by striking out “of appeals” the first place it
 2 appears and inserting “, except the Supreme Court,
 3 that is authorized to prescribe rules of the conduct of
 4 such court’s business under section 2071 of this title”
 5 in lieu thereof; and

6 (2) by striking out “the court of appeals” the
 7 second place it appears and inserting “such court” in
 8 lieu thereof.

9 (c) CLERICAL AMENDMENT.—The table of sections at
 10 the beginning of chapter 131 of title 28 of the United States
 11 Code is amended by striking out the item relating to section
 12 2072 and all that follows through the item relating to section
 13 2076 and inserting in lieu thereof the following:

“2072. Rules of procedure; power to prescribe.

“2073. Rules of procedure; method of prescribing.

“2074. Rules of procedure; submission to Congress; effective date.”.

14 **SEC. 3. COMPILATION AND REVIEW OF LOCAL RULES.**

15 Section 331 of title 28 of the United States Code is
 16 amended—

17 (1) in the fourth paragraph, by inserting after
 18 “any agency thereof.” the following: “The Conference
 19 shall periodically compile the rules which are pre-
 20 scribed under section 372(c)(11) of this title and the
 21 orders which are required to be publicly available
 22 under section 372(c)(15) of this title so as to provide a
 23 current record of such rules and orders.”; and

(2) by adding after the fifth paragraph the following new paragraph:

“The Judicial Conference shall periodically compile the rules which are prescribed under section 2071 of this title by courts other than the Supreme Court of the United States so as to provide a current record of such rules. The Judicial Conference shall periodically review such rules for consistency with rules prescribed under section 2072 of this title. The Judicial Conference may modify or abrogate any such rule found inconsistent in the course of such a review.”.

SEC. 4. RULES BY DISTRICT COURTS AND ORDERS BY CIRCUIT JUDICIAL COUNCILS AND THE JUDICIAL CONFERENCE.

(a) **RULES BY DISTRICT COURTS.**—(1) Section 2071 of title 28 of the United States Code is amended—

(A) by striking out “by the Supreme Court” and inserting “under section 2072 of this title” in lieu thereof; and

(B) by adding at the end the following paragraphs:
 “Any such rule of a district court shall be made or amended only after giving appropriate public notice and an opportunity for comment. Such rule so made or amended shall take effect upon the date specified by the district court and shall remain in effect unless modified or abrogated by the District Court or modified or abrogated by the judicial council

1 of the relevant circuit. Copies of such rules so made or
2 amended shall be furnished to the judicial council and the
3 Administrative Office of the United States Courts and be
4 made available to the public.”.

5 (2) Section 332(d) of title 28 of the United States Code
6 is amended by adding at the end the following new para-
7 graph:

8 “(4) Each judicial council shall periodically review the
9 rules which are prescribed under section 2071 of this title by
10 district courts within its circuit for consistency with rules pre-
11 scribed under section 2072 of this title. Each council may
12 modify or abrogate any such rule found inconsistent in the
13 course of such a review.”.

14 (b) ORDERS BY CIRCUIT JUDICIAL COUNCILS.—Sec-
15 tion 332(d)(1) of title 28 of the United States Code is amend-
16 ed by inserting after the first sentence the following new sen-
17 tence: “Any general order relating to practice and procedure
18 shall be made or amended only after giving appropriate
19 public notice and an opportunity for comment. Any such
20 order so relating shall take effect upon the date specified by
21 such judicial council. Copies of such orders so relating shall
22 be furnished to the Judicial Conference and the Administra-
23 tive Office of the United States Courts and be made available
24 to the public.”.

1 (c) RULES BY JUDICIAL CONFERENCE AND CIRCUIT
 2 JUDICIAL COUNCILS.—Section 372(c)(11) of title 28 of the
 3 United States Code is amended by inserting before “Any rule
 4 promulgated” the following new sentence: “Any such rule
 5 shall be made or amended only after giving appropriate
 6 public notice and an opportunity for comment.”.

7 SEC. 5. CONFORMING AND OTHER TECHNICAL AMENDMENTS.

8 (a) CONFORMING REPEAL OF CRIMINAL RULES ENA-
 9 BLING PROVISIONS.—(1) Title 18 of the United States Code
 10 is amended by striking out chapter 237.

11 (2) The table of chapters for part II of title 18 of the
 12 United States Code is amended by striking out the item relat-
 13 ing to chapter 237.

14 (b) CONFORMING REPEALS RELATING TO MAGIS-
 15 TRATES.—(1) Section 3402 of title 18 of the United States
 16 Code is amended by striking out the second paragraph.

17 (2) Section 636(d) of title 28 of the United States Code
 18 is amended by striking out “section 3402 of title 18, United
 19 States Code” and inserting “section 2072 of this title” in lieu
 20 thereof.

21 (c) CROSS REFERENCE TECHNICAL AMENDMENT.—
 22 Section 9 of the Act entitled “An Act to provide an adequate
 23 basis for the administration of the Lake Mead National
 24 Recreation Area, Arizona and Nevada, and for other pur-
 25 poses” approved October 8, 1964 (Public Law 89-639) is

1 amended by striking out the sentence beginning "The provi-
2 sions of title 18, section 3402".

3 (d) ORGANIC ACT TECHNICAL AMENDMENTS.—(1)
4 Section 22(b) of the Organic Act of Guam is amended by
5 striking out ", in civil cases" and all that follows through
6 "bankruptcy cases".

7 (2) Section 25 of the Organic Act of the Virgin Islands
8 is amended by striking out ", in civil cases" and all that
9 follows through "bankruptcy cases".

10 **SEC. 6. SAVINGS PROVISION.**

11 The rules prescribed in accordance with law before the
12 taking effect of this Act and in effect on the date of such
13 taking effect shall remain in force until changed pursuant to
14 the law as modified by this Act.

15 **SEC. 7. EFFECTIVE DATE.**

16 This Act shall take effect December 1, 1986.

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99TH CONGRESS
1ST SESSION

H. R. 3550

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 10, 1985

Mr. KASTENMEIER (for himself, Mr. MOORHEAD, Mr. MAZZOLI, Mr. SYNAR, Mr. FRANK, Mr. BOUCHER, and Mr. KINDNESS) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Rules Enabling Act of
5 1985".

1 SEC. 2. RULES ENABLING ACT AMENDMENTS.

2 (a) IN GENERAL.—Title 28 of the United States Code
3 is amended by striking out section 2072 and all that follows
4 through section 2076 and inserting in lieu thereof the
5 following:

6 **“§ 2072. Rules of procedure; power to prescribe**

7 “(a) The Supreme Court shall have the power to pre-
8 scribe general rules of practice and procedure (including rules
9 of evidence) for cases (including all bankruptcy matters) in
10 the United States district courts (including proceedings before
11 magistrates thereof) and courts of appeals.

12 “(b) Such rules shall not abridge, enlarge, or modify any
13 substantive right or supersede any provision of a law of the
14 United States except any rule of practice or procedure in
15 effect on the day before the date of the enactment of the
16 Rules Enabling Act of 1985.

17 **“§ 2073. Rules of procedure; method of prescribing**

18 “(a)(1) The Judicial Conference shall prescribe and pub-
19 lish the procedures for the consideration of proposed rules
20 under this section.

21 “(2) The Judicial Conference may authorize the ap-
22 pointment of committees to assist the Conference by recom-
23 mending rules to be prescribed under section 2072 of this
24 title. Each such committee shall consist of a balanced cross
25 section of bench and bar, and trial and appellate judges.

1 “(b) The Judicial Conference shall authorize the ap-
2 pointment of a standing committee on rules of practice and
3 procedure under subsection (a) of this section. Such standing
4 committee shall review each recommendation of any other
5 committees so appointed and recommend to the Judicial Con-
6 ference rules of practice and procedure and such changes in
7 rules proposed by a committee appointed under subsection
8 (a)(2) of this section as may be necessary to maintain consist-
9 ency and otherwise promote the interest of justice.

10 “(c)(1) Each meeting for the transaction of business
11 under this chapter by any committee appointed under this
12 section shall be open to the public, except when the commit-
13 tee so meeting, in open session and with a majority present,
14 determines that it is in the public interest that all or part of
15 the remainder of the meeting on that day shall be closed to
16 the public, and states the reason for so closing the meeting.
17 Minutes of each meeting for the transaction of business under
18 this chapter shall be maintained by the committee and made
19 available to the public, except that any portion of such min-
20 utes, relating to a closed meeting and made available to the
21 public, may contain such deletions as may be necessary to
22 avoid frustrating the purposes of closing the meeting.

23 “(2) Any meeting for the transaction of business under
24 this chapter by a committee appointed under this section

1 shall be preceded by sufficient notice to enable all interested
2 persons to attend.

3 “(d) In making a recommendation under this section or
4 under section 2072, the body making that recommendation
5 shall provide a proposed rule, an explanatory note on the
6 rule, and a written report explaining the body’s action, in-
7 cluding any minority or other separate views.

8 “(e) Failure to comply with this section does not invali-
9 date a rule prescribed under section 2072 of this title.

10 **“§ 2074. Rules of procedure; submission to Congress; ef-**
11 **fective date**

12 “(a) The Supreme Court shall transmit to the Congress
13 not later than May 1 of the year in which a rule prescribed
14 under section 2072 is to become effective a copy of the pro-
15 posed rule. Such rule shall take effect no earlier than Decem-
16 ber 1 of the year in which such rule is so transmitted unless
17 otherwise provided by law. The Supreme Court may fix the
18 extent such rule shall apply to proceedings then pending.

19 “(b) Any such rule creating, abolishing, or modifying an
20 evidentiary privilege shall have no force or effect unless ap-
21 proved by Act of Congress.”.

22 (b) **ADVISORY COMMITTEES FOR COURTS.**—Section
23 2077(b) of title 28, United States Code, is amended—

24 (1) by striking out “of appeals” the first place it
25 appears and inserting “, except the Supreme Court,

1 that is authorized to prescribe rules of the conduct of
 2 such court's business under section 2071 of this title"
 3 in lieu thereof; and

4 (2) by striking out "the court of appeals" the
 5 second place it appears and inserting "such court" in
 6 lieu thereof.

7 (c) CLERICAL AMENDMENT.—The table of sections at
 8 the beginning of chapter 131 of title 28 of the United States
 9 Code is amended by striking out the item relating to section
 10 2072 and all that follows through the item relating to section
 11 2076 and inserting in lieu thereof the following:

"2072. Rules of procedure; power to prescribe.

"2073. Rules of procedure; method of prescribing.

"2074. Rules of procedure; submission to Congress; effective date."

12 **SEC. 3. COMPILATION AND REVIEW OF LOCAL RULES.**

13 (a) COMPILATION.—Section 604(a) of title 28 of the
 14 United States Code is amended by adding at the end the
 15 following:

16 "(18) Periodically compile—

17 "(A) the rules which are prescribed under
 18 section 2071 of this title by courts other than the
 19 Supreme Court;

20 "(B) the rules which are prescribed under
 21 section 372(c)(11) of this title; and

22 "(C) the orders which are required to be
 23 publicly available under section 372(c)(15) of this
 24 title;

1 so as to provide a current record of such rules and
2 orders.”.

3 (b) REVIEW.—Section 331 of title 28 of the United
4 States Code is amended by inserting after the fifth paragraph
5 the following:

6 “The Judicial Conference shall review rules prescribed
7 under section 2071 of this title by the courts of appeals for
8 consistency with rules prescribed under section 2072 of this
9 title. The Judicial Conference may modify or abrogate any
10 such rule prescribed by a court of appeals found inconsistent
11 in the course of such a review.”.

12 **SEC. 4. RULES BY CERTAIN COURTS AND ORDERS BY CIRCUIT**
13 **JUDICIAL COUNCILS AND THE JUDICIAL CON-**
14 **FERENCE.**

15 (a) RULES BY CERTAIN COURTS.—(1) Section 2071 of
16 title 28 of the United States Code is amended—

17 (A) by inserting “(a)” before “Any”;

18 (B) by striking out “by the Supreme Court” and
19 inserting “under section 2072 of this title” in lieu
20 thereof; and

21 (C) by adding at the end the following:

22 “(b) Any rule prescribed by a court, other than the Su-
23 preme Court, under subsection (a) shall be prescribed only
24 after giving appropriate public notice and an opportunity for
25 comment. Such rule shall take effect upon the date specified

1 by the prescribing court and shall have such effect on pending
2 proceedings as the prescribing court may order.

3 “(c)(1) A rule of a district court prescribed under subsec-
4 tion (a) shall remain in effect unless modified or abrogated by
5 the judicial council of the relevant circuit.

6 “(2) Any other rule prescribed by a court other than the
7 Supreme Court under subsection (a) shall remain in effect
8 unless modified or abrogated by the Judicial Conference.

9 “(d) Copies of rules prescribed under subsection (a) by a
10 district court shall be furnished to the judicial council, and
11 copies of all rules prescribed by a court other than the Su-
12 preme Court under subsection (a) shall be furnished to the
13 Director of the Administrative Office of the United States
14 Courts and made available to the public.

15 “(e) If the prescribing court determines that there is an
16 immediate need for a rule, such court may proceed under this
17 section without public notice and opportunity for comment,
18 but such court shall promptly thereafter afford such notice
19 and opportunity for comment.

20 “(f) No rule may be prescribed by a district court other
21 than under this section.”.

22 (2) Section 332(d) of title 28 of the United States Code
23 is amended by adding at the end the following new para-
24 graph:

1 “(4) Each judicial council shall periodically review the
2 rules which are prescribed under section 2071 of this title by
3 district courts within its circuit for consistency with rules pre-
4 scribed under section 2072 of this title. Each council may
5 modify or abrogate any such rule found inconsistent in the
6 course of such a review.”.

7 (b) **ORDERS BY CIRCUIT JUDICIAL COUNCILS.**—Sec-
8 tion 332(d)(1) of title 28 of the United States Code is amend-
9 ed by inserting after the first sentence the following new sen-
10 tence: “Any general order relating to practice and procedure
11 shall be made or amended only after giving appropriate
12 public notice and an opportunity for comment. Any such
13 order so relating shall take effect upon the date specified by
14 such judicial council. Copies of such orders so relating shall
15 be furnished to the Judicial Conference and the Administra-
16 tive Office of the United States Courts and be made available
17 to the public.”.

18 (c) **RULES BY JUDICIAL CONFERENCE AND CIRCUIT**
19 **JUDICIAL COUNCILS.**—Section 372(c)(11) of title 28 of the
20 United States Code is amended by inserting before “Any rule
21 promulgated” the following new sentence: “Any such rule
22 shall be made or amended only after giving appropriate
23 public notice and an opportunity for comment.”.

1 SEC. 5. CONFORMING AND OTHER TECHNICAL AMENDMENTS.

2 (a) CONFORMING REPEAL OF CRIMINAL RULES ENA-
3 BLING PROVISIONS.—(1) Title 18 of the United States Code
4 is amended by striking out chapter 237.

5 (2) The table of chapters for part II of title 18 of the
6 United States Code is amended by striking out the item relat-
7 ing to chapter 237.

8 (b) CONFORMING REPEALS RELATING TO MAGIS-
9 TRATES.—(1) Section 3402 of title 18 of the United States
10 Code is amended by striking out the second paragraph.

11 (2) Section 636(d) of title 28 of the United States Code
12 is amended by striking out “section 3402 of title 18, United
13 States Code” and inserting “section 2072 of this title” in lieu
14 thereof.

15 (c) CROSS REFERENCE TECHNICAL AMENDMENT.—
16 Section 9 of the Act entitled “An Act to provide an adequate
17 basis for the administration of the Lake Mead National
18 Recreation Area, Arizona and Nevada, and for other pur-
19 poses” approved October 8, 1964 (Public Law 89-639) is
20 amended by striking out the sentence beginning “The provi-
21 sions of title 18, section 3402”.

22 (d) ORGANIC ACT TECHNICAL AMENDMENTS.—(1)
23 Section 22(b) of the Organic Act of Guam is amended by
24 striking out “, in civil cases” and all that follows through
25 “bankruptcy cases”.

1 (2) Section 25 of the Organic Act of the Virgin Islands
2 is amended by striking out “, in civil cases” and all that
3 follows through “bankruptcy cases”.

4 **SEC. 6. SAVINGS PROVISION.**

5 The rules prescribed in accordance with law before the
6 taking effect of this Act and in effect on the date of such
7 taking effect shall remain in force until changed pursuant to
8 the law as modified by this Act.

9 **SEC. 7. EFFECTIVE DATE.**

10 This Act shall take effect December 1, 1986.

○

BEFORE THE JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

TESTIMONY OF THE ALLIANCE FOR JUSTICE
ON THE 1984 PROPOSAL TO AMEND RULE 68

Submitted on behalf of
the Alliance for Justice by:

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January 28, 1985

Introduction

The following testimony on the proposal to amend Rule 68 of the Federal Rules of Civil Procedure is presented on behalf of the Alliance for Justice, a national association of twenty-six public interest law organizations.¹ The Alliance's members include civil rights, environmental, mental health, education, employment, and consumer law groups.² Working on behalf of these groups and the persons they serve, one of the Alliance's foremost purposes is to ensure access to the judicial process for those who have historically lacked the resources to assert their legal rights, including Black and Native Americans, poor persons, consumers, women, children, and persons institutionalized in mental health

1. In addition to this testimony, the Alliance will submit (before April 1, 1985) more detailed comments on the impact the proposed amendments would have on the attorney-client relationship, and on any questions that arise during the hearing and merit additional comment.

2. Members of the Alliance include: Business and Professional People for the Public Interest, the Center for Law and Social Policy, the Center for Law in the Public Interest, the Center for National Policy Review, the Center for Science in the Public Interest, Consumers Union, the Education Law Center, the Employment Law Center, the Environmental Defense Fund, Equal Rights Advocates, the Food Research and Action Center, Harmon, Weiss & Jordan, the Institute for Public Representation, the Juvenile Law Center, the Mental Health Law Project, the NOW Legal Defense and Education Fund, the National Education Association, the National Wildlife Federation, the National Women's Law Center, the Native American Rights Fund, the Natural Resources Defense Council, New York Lawyers for the Public Interest, Public Advocates, Inc., the Sierra Club Legal Defense Fund, the Women's Law Project, and the Women's Legal Defense Fund.

facilities. Members of the Alliance have litigated a number of significant cases on behalf of plaintiffs in these groups, and in so doing have often enabled their clients to fulfill the "private attorney general" role envisioned by Congress when it enacted public laws such as the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988).³

Often, Alliance members have been able to enforce their clients' constitutional or statutory rights through a negotiated settlement of litigation.⁴ However, some cases have proven

3. For examples of recent litigation in which Alliance members represented such plaintiffs, see Columbus Board of Education v. Penick, 443 U.S. 449 (1979) (holding systemwide school desegregation remedy proper on the basis of the lower court's findings and conclusions as to unconstitutional, racially segregative purpose and impact of school board's conduct); Liddell v. Board of Education, 491 F. Supp. 351 (E.D. Mo. 1980), aff'd, 667 F.2d 643 (8th Cir. 1981), cert. denied sub nom. Caldwell v. Missouri, 454 U.S. 1081, 1091 (1981) (holding St. Louis Board of Education and State of Missouri liable for the establishment and maintenance of a racially segregated public school system within St. Louis); Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (challenging the use of standardized IQ tests to place Black school children in programs for mentally retarded students).

4. See, e.g., Officers for Justice v. Civil Service Commission, 473 F. Supp. 801 (N.D. Ca. 1979), aff'd, 688 F.2d 615 (9th Cir. 1982) (approving a detailed settlement of race and gender employment discrimination case against the San Francisco police department); Parents Without Partners v. Massinga, C.A. No. JH-83-4313 (D. Md. consent decree dated Jan. 11, 1984) (state defendants agreed to provide child support enforcement services to all eligible parents in compliance with federal law); Cameron v. Montgomery County Child Welfare Service, 471 F. Supp. 761 (E.D. Pa. 1979) (denying summary judgment where "deprived" child alleged failure to provide him with adequate care, treatment, and services which would have enabled him to return home) (case later settled); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977) (denying in part motion to dismiss complaint that conditions and

(Footnote continued)

difficult to conclude through settlement, for a wide variety of reasons. In certain instances, for example, judicial resolution of an unsettled question of law has been an important precondition to settlement.⁵ Hence, although Alliance members appreciate the role that settlement can play in their clients' representation, they are also aware of the fact that settlement, just as litigation, is a limited tool.⁶

Summary of Testimony

The Alliance for Justice opposes the promulgation of the proposed amendments to Rule 68 on a number of grounds. The 1984 proposal, like its 1983 predecessor, is a drastic, defendant-oriented measure that will undermine and in many respects destroy the incentive system Congress created for citizens to serve as "private attorneys general" in numerous

4. (continued)

treatment of Youth Study Center deprived juveniles of constitutional rights) (case later settled); Consumers Union v. Virginia State Bar, C.A. No. 75-0105-R (E.D. Va. 1975) (settled after suing for the right to provide information about law firms in a legal directory without being subject to disciplinary action).

5. See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976) (settled following the Supreme Court's determination of whether and to what extent area-wide relief should be available to remedy deliberate racial discrimination in housing).

6. In addition to litigation, members of the Alliance often use other methods, such as legislative and administrative advocacy, to defend or advance their clients' rights.

categories of public law litigation. Moreover, in these categories of litigation (covered by asymmetrical fee-shifting laws), and in litigation generally, the proposal will create a series of problems for litigants, attorneys, and the courts. The changes made by the Advisory Committee in the 1984 draft have not eliminated these problems.

Two issues must be examined carefully by the Advisory Committee at the outset. First, is there really a need for a proposal of this type, and has that need been demonstrated? In arguing for the proposal, proponents have referred to "enormous delays" in federal court litigation, and also to their desire to prompt more case settlements, more rapidly. However, the statistics that are available suggest a general profile of reasonable promptness and an increasing incidence of non-trial dispositions in federal court cases. Even assuming arguendo that there is a small number of federal court cases with an overly long life, should the Advisory Committee recommend a measure that will also have a severe adverse impact on the majority of litigants whose cases are promptly adjudicated or settled? The Alliance submits that it should not, and that the proposal at issue here is not an appropriate or acceptable mechanism for addressing delay in a small fraction of cases.

The second issue that must be examined at the outset is the question of Supreme Court authority to promulgate a rule of this type. The Rules Enabling Act limits the Court to the promulgation

of rules prescribing practice and procedure for the federal courts, and prohibits the adoption of rules which "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072.

The rule proposed here would modify and abridge substantive rights, principally because it works in derogation of the incentive system Congress designed in enacting a number of fee-shifting statutes. Although proponents of the measure have maintained that it does not modify those laws, they are apparently not aware that proposals very similar to (in fact, in some respects less drastic than) this one have been considered and rejected by Congress three times in recent bills to amend certain of the fee-shifting statutes.⁷ Given Congress' rejection of these proposed modifications, and given the Supreme Court's emphasis on the fact that changes in the rules for allocating attorney's fees should be made by Congress and not by the Court (see Alyeska v. Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)), the Advisory Committee should not recommend a measure of this type to the Court.

7. Had Judge Mansfield and Professor Miller been aware of these congressional deliberations (discussed in Part III.C., below, pages 29 to 33), it is unlikely they would have claimed, in attempting to argue that this proposal is not inconsistent with congressional enactments and policies, that "Congress might well view promotion of settlement by award of fees as something to be encouraged, particularly when the rejection is unreasonable under the circumstances." W.R. Mansfield and A.R. Miller, Proposed Amendments of Rule 68 -- Background Memorandum at 7-8 (Apr. 15, 1984).

The parts of the 1984 draft which allow district courts to make highly discretionary determinations about whether to impose Rule 68 sanctions and in what amount may protect some litigants, but will engender numerous problems for others. These provisions will result in a sizeable volume of collateral litigation on fee and sanctions issues -- litigation with a scope of discovery and proof potentially broader than discovery and proof on the merits. It is possible, if indeed not likely, that if the amendments are adopted, district courts will devote increasing amounts of time to collateral fee and sanctions adjudication, and decreasing amounts of time to interpreting and issuing orders for the enforcement of federal laws and constitutional rights. Additionally (as the Alliance for Justice will explain in detail in written comments to be filed shortly after the hearing), the proceedings on fee and sanctions issues under an amended Rule 68 will exacerbate existing conflicts and problems in the attorney-client relationship and also create new conflicts and problems in that relationship.

For all of the foregoing reasons, discussed in more detail in the following pages, the Alliance for Justice submits that the proposal to amend Rule 68 is highly ill-advised, and should be withdrawn by the Advisory Committee.

I. The Advisory Committee Has Not Demonstrated That There Is a Need For the Proposed Amendments.

Given the substantial impact that the proposed amendments will have, it is incumbent upon the members of the Advisory Committee urging their adoption to demonstrate that there is a need for changes of this type. The Committee has indicated that the proposal "is designed to encourage early settlements, avoid protracted litigation, and thus reduce the current enormous delay and expense that marks dispute resolution in most federal courts."⁸ However, the Committee has not released any statistics or other information documenting the assertion that "enormous delay" currently characterizes most federal court proceedings.

In fact, the statistics that are available suggest that litigants in the federal courts are not, in most cases, experiencing enormous delays. According to the 1983 Annual Report of the Director of the Administrative Office of the United States Courts, the overall median time from filing to disposition for civil cases (excluding recovery of overpayment and enforcement of judgment cases) was nine months, and the median time for all cases

8. Transmittal Letter from the Honorable Walter R. Mansfield to the Committee on Rules of Practice and Procedure (Aug. 1984), reprinted in 590 F. Supp. at CXXXVII (1984).

disposed of during or after trial was nineteen months.⁹ These figures suggest a pattern of relatively prompt dispositions, even for cases that proceed to trial -- a pattern similar to that outlined in a 1978 sample of cases drawn from federal and state courts in several jurisdictions by researchers at the Civil Litigation Research Project. These researchers observed that "more than half of the cases [were] terminated within the first year, and a very substantial number, much more than half, within the first two years. In all but a couple of courts, no more than 10 percent of the cases remain[ed] after a 24-month interval."¹⁰ They also observed:

The probability of a case going to trial, in both the state and federal courts, is clearly highest in [the] 8- to 20-month period [after filing of the complaint], and one of our very tentative conclusions is that a large number of cases, at least in our sample, reach trial without enduring an overly long case life. This is not a conclusive finding, but if it is true that there is not as long a delay as has been thought between the filing of a case and when it goes to trial, that is obviously grist for the mill, something to be pursued.¹¹

Disposition statistics of this type do not suggest significant

9. Annual Report of the Director of the Administrative Office of the United States Courts 142 (1983).

10. See Grossman, "The Pace of Court Activity," in Adler, Felstiner, Hensler and Peterson (eds), The Pace of Litigation: Conference Proceedings (Santa Monica: The Rand Corporation, 1982) at 62.

11. Id. at 66-67.

delays; nor do they provide support for the type of drastic remedy proposed in the Rule 68 amendments.

There remains, of course, the possibility that discovery disputes or abuses may occasion delay. However, Rules 26, 27, 30, and 37 already provide specific, carefully structured measures for addressing these problems. Provisions of the type contained in the Rule 68 proposal are neither appropriate for this purpose, nor likely to be effective.

Additionally, to the extent that the proposal is intended to increase the number of cases in which the parties settle rather than proceeding to trial, or to increase the pace at which cases are settled, neither the Advisory Committee nor any other organization has demonstrated that there is a need for changes of this type. In fact, the percentage of cases in the federal courts which reach trial has been gradually declining, from ten percent in 1970 to five and four-tenths percent in 1983.¹² There has been no showing that to the extent one might identify certain cases as cases that should settle, these cases are not settling now. Nor has there been any showing that cases that currently settle after several steps in discovery should be settling sooner.

Nor, for that matter, has anyone demonstrated that current settlement incentives are inadequate, or that the kinds of

12. Annual Report of the Director of the Administrative Office of the United States Courts 142 (1983).

penalties the Advisory Committee's proposal would add are appropriate and workable. As one district judge pointed out in opposing the 1983 draft of the proposal to amend Rule 68:

It has been my experience that the economic incentives to accept reasonable offers are generally more than sufficient in the settlement of cases. While it is true that sometimes reasonable offers may be rejected by a party, these are only in exceptional matters. I do not believe a rule change as sweeping as proposed in the above amendment to Rule 68 is required or even desirable.¹³

Finally, as members of the Advisory Committee are aware, trials can and do serve useful functions, both in certain individual cases and more broadly in our system of justice. In an individual case, a trial provides a record for the fair adjudication of a dispute that has resisted informal resolution. In a broader, more systemic sense, the trial of a significant dispute between two or more parties provides a firm foundation for the exposition and enforcement of constitutional, statutory, and other public policies.¹⁴

A significant proportion of our federal laws, including our civil rights laws, are premised on the assumption that persons seeking redress from the government, or from other private

13. Letter from United States District Judge James McGirr Kelly (E.D. Pa.) to Committee on Rules of Practice and Procedure (Dec. 14, 1983) (on file at the Administrative Office of the United States Courts).

14. See Fiss, Against Settlement, 93 Yale L.J. 1073, 1085-86 (1984).

parties, will be able to demonstrate that the problems they allege actually exist, and that the difficulties or wrongs for which they seek redress actually took place.¹⁵ For this reason, if for no other, we should hesitate before adopting federal court rules that make it difficult if not impossible for litigants to avail themselves of our traditional judicial processes for demonstrating one's entitlement to redress and obtaining that redress.

The Alliance for Justice is not alone in opposing the Rule 68 amendments for these reasons, and for the other reasons set forth in its testimony and comments. As members of the Advisory Committee will recall, the Alliance was one of numerous witnesses and commenters who opposed the 1983 version of Rule 68 amendments.¹⁶ It was the Alliance's view, and the view of many bar associations, government officials, and law professors, that the 1983 proposal, if adopted, would have sharply reduced access to the federal courts for litigants of limited means, created several new problems and seriously exacerbated existing difficulties in attorney-client relationships, engendered a large volume of collateral proceedings on attorney's fee issues,

15. See generally Days, Seeking a New Civil Rights Consensus, 112 *Daedalus* (Journal of the American Academy of Arts and Sciences) 197, 207-214 (Fall 1983).

16. See Testimony of the Alliance for Justice on Proposed Amendments to Rule 68 (Jan. 13, 1984), and Comments (Mar. 7, 1984) (on file at the Administrative Office of the United States Courts).

conflicted with numerous federal fee-shifting statutes and raised serious questions as to the authority vel non of the Supreme Court to prescribe amendments of this type via rulemaking.¹⁷

More than a dozen prominent state, city, and county bar associations studied the 1983 proposal; all but one (a "defendants' bar association") opposed it.¹⁸ Public interest groups unanimously opposed it.¹⁹ Numerous law faculty members

17. Id., see also testimony and comments of those organizations and individuals listed in notes 18 to 21, below.

18. The bar associations who testified or submitted comments in opposition to the 1983 proposal included the Association of the Bar of the City of New York, the National Bar Association, the Federal Courts and Practice Committee of the Los Angeles County Bar Association, the Los Angeles Chapter of the Federal Bar Association Rules Committee, the Federal Courts Committee of the California State Bar, and Ohio State Bar, the Civil Practice and Procedure Committee of the Arizona State Bar, the Committee on the Federal Courts of the New York County Lawyers Association, the Illinois State Bar Association, the Philadelphia Bar Association, the Administrative Law and Litigation Divisions of the District of Columbia Bar, the Federal Litigation Section of the Federal Bar Association, and the National Association of Railroad Trial Counsel. The American College of Trial Lawyers testified in support of the proposal. (Copies of the foregoing testimony and comments, and of the submissions cited in notes 19 to 21 below, are on file at the Administrative Office of the United States Courts.)

19. In addition to Alliance members, public interest groups testifying or filing comments in opposition to the proposal included the American Civil Liberties Union, the NAACP Legal Defense Fund, Inc., the Mexican American Legal Defense Fund, and the Public Citizen Litigation Group.

reviewed the proposal and warned the Committee about its problems.²⁰ Government officials and agencies who reviewed and commented on the proposal advised against it,²¹ and suggested that matters of this type were within Congress' jurisdiction, not the Advisory Committee's or Supreme Court's.²² The only public support for the proposal came in a series of short letters from individual lawyers who endorsed the idea in conclusory terms. It is on this record of minimal support that the proposal is advanced again, in a form that raises many similar problems as well as new ones.

20. See, e.g., testimony of Professor Judith Resnik (U.S.C.) (endorsed by, inter alia, the Society of American Law Teachers); comments from Professor Owen Fiss (Yale); but cf. comments of Professor John Leubsdorf (Boston University) (endorsing the idea but suggesting that litigation conducted under fee-shifting statutes be exempted).

21. See Letter from D. Lowell Jensen, Acting Deputy Attorney General, U.S. Dept. of Justice, to the Honorable Edward T. Gignoux (Feb. 28, 1984) (hereinafter cited as "Justice Department Comments"); Letter from Daniel Goelzer, General Counsel, SEC, to the Honorable Edward T. Gignoux (Mar. 14, 1984); and Letter from Senator Arlen Specter to Committee on Rules of Practice and Procedure (Feb. 28, 1984); see also Memo from Shirley Hufstedler (former circuit judge and Education Dept. Secretary) to the Committee on Rules of Practice and Procedure.

22. See Justice Department Comments at 2-3.

II. The Proposal Will Work in Derogation of Plaintiffs' Rights Under Numerous Federal Fee-Shifting Statutes

Alliance for Justice members often litigate on their clients' behalf under one of several federal fee-shifting statutes designed to encourage plaintiffs to enforce public laws as "private attorneys general." Civil rights, environmental, and consumer laws are good examples.²³ Each of these laws has an asymmetrical fee-shifting provision -- a section providing that a plaintiff who litigates and wins will be entitled to recover attorney's fees, but that if the plaintiff loses and defendant wins, there will generally be no fee-shifting.²⁴

23. See, e.g., 42 U.S.C. § 1988 (Civil Rights Attorney's Fees Awards Act of 1976); 42 U.S.C. § 7607(f) (Clean Air Act); 42 U.S.C. §§ 7604(d), 7622(b)(2)(B) (Clean Air Act Amendments of 1977); 16 U.S.C. § 1540(g)(4) (Endangered Species Act of 1973); 43 U.S.C. § 1349(a)(5) (Outer Continental Shelf Lands Act Amendments of 1978); 42 U.S.C. § 6972(e) (Resource Conservation and Recovery Act of 1976); 30 U.S.C. § 1270(d) (Surface Mining Control and Reclamation Act of 1977); and 15 U.S.C. § 1640(a) (Truth-in-Lending Act).

Other federal laws with asymmetrical fee-shifting provisions to encourage private enforcement, less frequently used in the work of Alliance members, include, for example, 15 U.S.C. § 15 (Clayton Antitrust Act); and 5 U.S.C. § 552a(g)(B) (Privacy Act).

24. A prevailing defendant is eligible for fees under asymmetrical fee-shifting statutes only in those rare circumstances in which the plaintiff's action was "brought in bad faith and was clearly frivolous, vexatious, or brought for harassment purposes" (R. Larson, Federal Court Awards of Attorney's Fees 85-91 (1981)), or pursuant to a slightly broader standard applicable to Title VII litigation, if a plaintiff's claim "was frivolous, unreasonable, or groundless" (Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)).

In enacting the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988), a leading example of these asymmetrical fee-shifting statutes, Congress made its purposes clear. The fee-shifting provision was intended to encourage persons whose civil rights have been violated to defend their rights in court, and also to encourage attorneys to represent them. As the Senate Report explains:

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If the private citizens are to be able to assert their civil rights and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.²⁵

Members of Congress repeatedly stressed the importance of fee awards for plaintiffs and their counsel in encouraging litigation by "private attorneys general:"

All of [the] civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.²⁶

25. S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News, 5908, 5910.

26. Id.; see also H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976).

The proposal to amend Rule 68 will, if adopted, work in derogation of plaintiffs' rights under these fee-shifting statutes. Both the 1983 and the 1984 versions of the proposal are drafted in a form that will provide defendants with a mechanism for reducing or eliminating the fee recoveries which Congress intended as an incentive to encourage the enforcement of public laws and policies. Both proposals are wholly defendant-oriented in their impact on parties litigating under asymmetrical fee-shifting laws; both provide defendants with new rights and increased leverage, and make concomitant reductions in the rights and leverage available to plaintiffs.

The importance of this factor in our assessment of the pending Rule 68 proposal cannot be overemphasized. Although the Advisory Committee has asserted "[n]othing in the [proposed] rule affects the court's statutory authority to award attorney's fees to a prevailing party in certain types of cases,"²⁷ the impact of the proposal could not be clearer or more destructive of the incentive system Congress intended to create when it enacted fee-shifting statutes. The Advisory Committee's proposal gives defendants a method (albeit one subject to district court discretion) to take away with the left hand what Congress has conferred with the right.

27. See draft Committee Note, paragraph 13, reprinted in 590 F. Supp. at CL (1984).

Specifically, this is how the new proposal would work: On its face, the 1984 draft purports to provide each side, plaintiff and defendant, with an opportunity to recover a "sanction" (based in significant part on "costs and expenses, including ... attorney's fees") if an opponent "unreasonably" rejects a settlement offer. Since defendants in most cases currently have no statutory right to recover their attorney's fees from plaintiffs, the opportunity to recover a sanction (based on fees incurred) in an amended Rule 68 will furnish defendants with a substantial incentive to make settlement offers.²⁸

However, plaintiffs, who already have a statutory right if they prevail to recover attorney's fees for the entire course of litigation from defendants, gain no additional benefit or leverage from the Advisory Committee's proposal. Even if a plaintiff makes an offer and a defendant unreasonably refuses it, it is unlikely that under the new rule a district judge will award plaintiff a sanction for the defendant's refusal to settle. for two reasons. First, the proposed amendments do not, by their terms, direct the

28. A defendant seeking to maximize his advantage under the new rule would make a relatively low settlement offer, one just high enough to ensure that the court would not later find it a "sham." If the offer were to be accepted because the plaintiff does not want to risk a Rule 68 sanction, then the defendant will have succeeded in settling the case for less than he might have otherwise had to pay. If the plaintiff were to reject the Rule 68 offer, and the defendant thinks he (defendant) has a good chance of winning the case (and thereby avoiding liability on the merits and recovering a Rule 68 sanction), he may be likely to decline any counter-offer or subsequent settlement offer. In this respect, the new rule may encourage more defendants to take cases to trial.

district judge to make an award in those circumstances. Rather, the amendments direct the district judge to calculate sanctions based on the "attorney's fees incurred by the offeror;" hence, it is unlikely that a district court will view a plaintiff-offeror who has prevailed (and recovered fees statutorily) as having "incurred" fees upon which a sanction could be based. Second, even assuming that this language in the proposal were to be altered so as to make fee sanctions under a new Rule 68 bilateral, it is unlikely that a district judge would award a plaintiff, who has just recovered judgment on the merits and a statutory fee award, a significant additional monetary recovery in the form of a Rule 68 sanction, notwithstanding the unreasonableness of a defendant-offeree's refusal to settle. In these critical respects, the Rule 68 proposal offers defendants, and not plaintiffs, incentives and rewards for making settlement offers.

Moreover, under the Rule 68 proposal, these incentives and rewards for defendants are to be provided at the price of diminishing, offsetting, or erasing, and in some cases even outweighing, the incentives that Congress enacted to encourage private enforcement of certain public laws and policies. The Advisory Committee proposes to reduce the plaintiff's attorney's fee recovery by subtracting the amount of a "sanction" (reflective of, inter alia, defendant's post-offer fees). Depending on defendant's choice of counsel and that counsel's hourly rate, this reduction could be substantial, indeed it could outweigh the

amount of the plaintiff's statutory fee entitlement.

To recapitulate briefly, the Advisory Committee proposes that plaintiffs (who are currently entitled under federal fee-shifting statutes to recover statutory fee awards if they prevail) should, if they refuse a settlement offer, pay defendants a "sanction" (based in substantial part on the amount of defendants' post-offer fees). The result will be that plaintiffs' statutory fee entitlement, which Congress intended as an incentive for plaintiffs and their attorneys to bring litigation enforcing federal laws, will be at a minimum greatly diminished, and in many cases entirely eradicated or outweighed by the monetary sanctions assessed against them. In addition, as we explain in Part VI (below, pages 42 to 44), lawyers will be discouraged from representing plaintiffs in actions to enforce federal laws by the prospect of serious attorney-client problems and conflicts engendered by the implementation of this proposal.

Nevertheless, as noted above, the Advisory Committee contends that "[n]othing in the rule affects the court's statutory authority to award attorney's fees to a prevailing party in certain types of cases."²⁹ This is wrong. It is tantamount to saying, for example, that a rule which limited the duration of an antitrust case to six months would not affect the courts'

29. See draft Committee Note, paragraph 13, reprinted in 590 F. Supp. at CL.

statutory authority to hear and decide antitrust cases.³⁰

In the foregoing respects, the proposal before the Advisory Committee is flatly inconsistent with the asymmetrical fee-shifting laws and at odds with their underlying congressional policies. This fact cannot be altered or obscured by vesting discretion in district judges to apply the new rule when they feel a plaintiff has been "unreasonable," or by calling the monetary awards under the new rule "sanctions" rather than "attorney's fees."

It is simply incorrect to assert, as some members of the Advisory Committee have, that this proposal can be viewed as consistent with congressional enactments and objectives because "Congress might well view promotion of settlement by award of fees as something to be encouraged."³¹ Two facts reveal the fallacy of such an assertion. First, Congress, regardless of what its views "might" be, did not include defendant-oriented mechanisms of the

30. The last sentence in paragraph 13 of the draft Committee Note is ambiguous and may be misleading. It reads: "Even without [the proposed amendments to] the rule the court already has the power in determining the value of the attorney's services under a fee award statute to take into consideration a party's refusal to accept a reasonable offer that, if accepted, would have eliminated the necessity for further legal services from the date of the offer." However, existing law does not establish whether and to what extent the district courts have the authority to reduce a plaintiff's attorney's fee award for an "unreasonable" refusal to settle. This is one of the issues before the Supreme Court in Marek v. Chesny, No. 83-1437 (U.S. argued Dec. 5, 1984).

31. See W.R. Mansfield and A.R. Miller, Proposed Amendment of Rule 68 -- Background Memorandum at 7-8 (Apr. 15, 1984).

type the Advisory Committee is proposing in any of its asymmetrical fee-shifting laws. Indeed, there is evidence that during its consideration of some of those laws Congress weighed the impact they would have on settlement incentives and determined that it had struck an appropriate balance, without the types of modifications the Advisory Committee's proposal would engraft.³² Second, a review of the record in recent years reveals that Congress has three times considered and rejected legislative proposals similar to, and indeed less drastic than, these Rule 68 amendments. (See discussion in Part III.C., below, on pages 29 to 33.) It simply cannot be argued, in the face of this legislative history, that the instant proposal is somehow consistent with congressional purposes and enactments.

Rather, the fact that this proposal is inconsistent with numerous federal fee-shifting statutes suggests that the changes the Advisory Committee has drafted may exceed the scope of the Supreme Court's rulemaking authority.

32. See legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912; and H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976).

III. There Are Serious Questions as to the
Supreme Court's Authority to Promulgate
the Proposed Amendments.

The issue is whether the Supreme Court has the authority under the Rules Enabling Act to promulgate a rules change of the type proposed here. Under the Act, Congress has delegated authority to the Court "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the federal courts." 28 U.S.C. § 2072. However, the Act prohibits the Court from promulgating rules that "abridge, enlarge, or modify any substantive right." *Id.* Hence, the question is whether this Rule 68 proposal is one confined to prescribing the practice and procedure of the federal courts, or one which abridges, enlarges, or modifies any substantive right.

Members of the Alliance submit that the proposal is one that will modify and abridge substantive rights, in particular those substantive rights created by Congress in enacting the federal fee-shifting laws. Our reasoning is outlined in the following pages. We urge the members of this Committee, and the other members of the Judicial Conference, to afford this issue serious consideration.

A. The Substance-Procedure Distinction in the Act Allocates Decision-Making Authority Between Congress and the Court.

The language of the Rules Enabling Act that distinguishes between rules prescribing procedure and rules affecting substantive rights was drafted to allocate the responsibility for decision-making between Congress and the Court.³³ As Professor Burbank has explained in a detailed study of the history of the Act, the distinction was intended "to determine which federal lawmaking body, the Court or Congress, shall decide whether there will be federally enforceable rights regarding the matter in question and the content of those rights."³⁴ While the provisions of the Enabling Act were under consideration in Congress, members of the House Judiciary Committee questioned Thomas Shelton, chair of the ABA Committee on Uniform Judicial Procedure and one of the Act's leading proponents, about the advisability of delegating rulemaking authority to the Supreme Court, and about the scope of the delegation. Mr. Shelton responded, "[T]he Supreme Court is not going to hold that it has the power to legislate, and it will confine itself to regulating the detail machinery of the

33. See Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1113-15 (1982).

34. Id. at 1113.

trial courts."³⁵

The language that Congress subsequently adopted to define the scope of the Court's rulemaking authority, which rests on the substance-procedure distinction, serves several purposes. It ensures, in light of the concerns identified by some legislators, that the delegation will be consistent with constitutional principles governing the delegation of rulemaking authority and the separation of powers between the Congress and the Court.³⁶ For this reason, the Act must be interpreted in light of these constitutional principles. However, as commentators have noted, the substance-procedure distinction also was intended and serves to establish a statutory perimeter for rulemaking that is smaller than constitutional principles would require and that does not depend for its precise contours upon evolving constitutional doctrines.³⁷

Supreme Court rulings interpreting this statutory language are limited, both in number and in the extent of their analysis. However, as the Court emphasized in Sibbach v. Wilson & Co.

35. Reforms in Judicial Procedure: American Bar Association Bills, Hearings Before the House Judiciary Committee, 63rd Cong., 2d Sess. 22 (1914); see also S. Rep. No. 1174, 69th Cong., 1st Sess. 11 (1926) ("Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision [the Rules Enabling Act] in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function.").

36. Id.; see also H.R. Rep. No. 462, 63rd Cong., 2d Sess. 16 (1914); Burbank, supra note 33, at 1013-31.

37. See Burbank, supra note 33, at 1013-31.

shortly after the Act was passed and the first set of rules was promulgated, the Act only delegates to the judiciary authority to make rules not inconsistent with the statutes or constitution of the United States."³⁸ Hence, in applying the substance-procedure distinction, and thereby seeking to allocate certain decision-making responsibility to the Court, the Advisory Committee must ensure that the rules it recommends do not contravene congressional enactments or constitutional principles.

B. The Rule 68 Proposal Abridges and Modifies Substantive Rights Embodied in Federal Fee-Shifting Statutes.

Members of the Alliance submit that the Rule 68 proposal impermissibly abridges and modifies substantive rights, particularly insofar as its "sanctions" mechanism contravenes federal fee-shifting statutes. The substantive rights that would be abridged and modified can be conceptualized in either one of two ways: 1) as legal rights, specific to individual litigants and in the nature of remedial rights, to recover reasonable attorney's fees in addition to other appropriate remedies upon prevailing; or 2) as more general public rights to the enforcement of the mandates of those public laws that contain fee-shifting provisions. The legislative history of several such public laws

38. 312 U.S. 1, 9-10 (1941).

with fee-shifting provisions, particularly the Civil Rights Attorney's Fees Awards Act of 1976, indicates that members of Congress viewed the enactments as creating legal rights in both of these two respects, the first in order to guarantee the second.³⁹

In recent decisions on attorney's fee issues, members of the Court have often viewed the federal fee-shifting statutes in the first of these two perspectives, as creating rights specific to individual litigants. In Maine v. Thiboutot, for example, the Court explained that "a major purpose of the Civil Rights Attorney's Fees Awards Act was to benefit those claiming deprivations of constitutional and civil rights.... Congress viewed the fees authorized by § 1988 as 'an integral part of the remedies necessary to obtain' compliance with § 1983."⁴⁰ In Hensley v. Eckerhart, Justice Brennan characterized attorney's fee rights created by federal statutes as "far more like new causes of action tied to specific rights than like background procedural rules governing any and all litigation."⁴¹

However, the second, broader perspective on these substantive

39. In recent comments on the Advisory Committee's 1983 proposal to amend Rule 68, Representative Kastenmeier also opined that "Congress conferred a substantive right by enacting the Civil Rights Attorney Fee Award Act." 130 Cong. Rec. 4105, n.3 (daily ed. Oct. 1, 1984).

40. 448 U.S. 1, 9-11 (1980), quoting from S. Rep. No. 94-1011 at 5 (1976).

41. 103 S. Ct. 1933, 1944 n. 2 (1983) (Brennan, J., concurring in part).

rights is equally important. Congress' intention was to ensure that the public at large, and not just a small number of plaintiffs, could rely upon the mandates of the civil rights, environmental, and other public laws. In this respect, the substantive rights that are threatened here are the right to live in a society free from discrimination based on race, color, or national origin, and the right to live in a safe and healthy environment, inter alia. One can view these substantive rights as contained either in the statutory language establishing the general standards for non-discrimination and environmental protection, or in the provisions Congress has made for the effective enforcement of those standards. Members of Congress thought the two sets of provisions were integrally related. They explained, for example, in enacting the Civil Rights Attorney's Fees Awards Act of 1976:

All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.... Not to award counsel fees ... would be tantamount to repealing the [civil rights] laws [themselves] by frustrating their basic purpose.... Without counsel fees the grant of federal jurisdiction is but an empty gesture.⁴²

Members of the Court have also recognized this aspect of the

42. S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 3 (1976) (citations omitted; emphasis supplied).

rights granted by fee-shifting statutes. As Justice Rehnquist observed in 1980, to award attorney's fees as a Rule 68 penalty "could seriously undermine the purposes behind the attorney's fees provision of the Civil Rights Act."⁴³ In fact, the private enforcement provisions and attorney's fee incentives in the Act are even more critical to guaranteeing civil rights today than in previous years because the Executive Branch has decided to sharply reduce the federal government's enforcement role.

We do not think the changes made by the Advisory Committee have eliminated or resolved this problem. One of these changes affords district judges explicit discretion to determine when sanctions (consisting largely of attorney's fees) will be imposed, and in what amount. According to the Committee's draft, this discretion is to be exercised when the district judge determines that the offer has been rejected "unreasonably."

However, this discretionary feature will not work to protect and preserve the congressionally-designed fee incentive system. District judges' rulings on the "reasonableness" issue will be inherently subjective and impossible to predict, particularly at the times when the fee incentive system should be working to encourage private enforcement -- when the plaintiff is searching for a lawyer to advise and possibly represent him or her, when the

43. Delta Air Lines, Inc. v. August, 450 U.S. 346, 378 (Rehnquist, J., dissenting).

plaintiff is deciding whether or not to file suit, and when the plaintiff is deciding whether or not a settlement offer (under Rule 68) sufficiently remedies the statutory violation and compensates for the injury.⁴⁴ Additionally, from the perspective of potential counsel, if Rule 68 is adopted, there will be far less, if any incentive to represent plaintiffs in this type of public law litigation if the statutory fees are likely to be offset or outweighed by sanctions at the close of the litigation, and particularly little incentive to continue representing a plaintiff after a defendant has made a settlement offer just high enough to avoid being labelled a "sham" offer.⁴⁵

C. Congress Has Recognized That Changes of This Type Would Modify the Fee-Shifting Statutes.

Although proponents have argued that this Rule 68 proposal will not modify the fee-shifting statutes, it is in fact quite similar to, and in some respects more drastic than, bills to modify the incentives in fee-shifting statutes that Congress has considered and rejected three times during the last four years.

44. For an example of a case which illustrates the difficulty of predicting how a district judge will rule on the "reasonableness" issue, see the discussion of Marek v. Chesny in Part IV., below, pages 37 to 39.

45. See Chesny v. Marek, 720 F.2d 474, 478-79 (7th Cir. 1983) (Posner, J.), cert. granted, 104 S. Ct. 2149 (1984).

If members of Congress define measures of this type as amendments to the fee-shifting statutes and have thus far consistently rejected them, it is not within the province of this Committee or the Supreme Court to promulgate similar proposals, albeit with different labels, as Federal Rules of Civil Procedure.

The proposals that Congress has considered and rejected would have modified the incentive scheme by requiring the court to deny prevailing plaintiffs recovery for any attorney's fees incurred after declining an offer of settlement, if the offer of settlement turned out to be as favorable or "substantially favorable" as the relief ultimately awarded by the court. Although two of these three legislative proposals did not include the discretionary feature that is in the Advisory Committee's draft, each of the three proposals were considerably less drastic than the Advisory Committee's draft insofar as they only provided for a plaintiff's attorney to lose part of his or her statutory fee, not for the plaintiff to have to pay part of the defendant's fee in the form of a "sanction."

Senator Hatch first proposed these types of modifications in the attorney's fees incentives during a series of hearings held in 1981 and 1982 to consider amendments in Section 1983 and Section

1988.⁴⁶ After the hearings, which are described briefly below, the 97th Congress took no further action on the proposal. In the first session of the 98th Congress, Senator Hatch included an identical proposal in S. 141, a bill containing both a "good faith" defense for municipal governments sued under Section 1983 and a number of additional limitations on attorney's fee awards under Section 1988.⁴⁷ No hearings on the bill were held and no other action was taken.

Then in the second session of the 98th Congress, the Reagan Administration requested a similar fee limitation as part of an omnibus attorney's fee bill.⁴⁸ In that bill, the Administration proposed amending both Section 1988 and several other federal fee-shifting statutes in this manner. Hearings were held by the Subcommittee on the Constitution of the Senate Committee on the Judiciary on September 11, 1984; no further action was taken.

46. See Attorney's Fees Awards: Hearings on S. 585 (and on Amendments to Be Proposed by Senator Orrin G. Hatch) Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 12-13 (Comm. Print 1982) [hereinafter cited as 1982 Hearings]; see also Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 1st Sess. (Comm. Print 1981) [hereinafter cited as 1981 Hearings].

47. S. 141, 98th Cong., 1st Sess., 129 Cong. Rec. S636 (daily ed. Jan. 26, 1983).

48. H.R. 5757, 98th Cong., 2d Sess. (1984) ("The Legal Fees Equity Act"); S. 2802, 98th Cong., 2d Sess., 130 Cong. Rec. S8498-8500 (daily ed. June 27, 1984).

As perhaps might be expected, the discussion at the congressional hearings paralleled the discussion at last year's Advisory Committee hearing in some respects. There was a wide divergence of opinion on whether there was a need to increase settlement incentives in civil rights and other types of public law litigation. Witnesses varied considerably in their views on whether and to what extent parties had been able to reach settlements, and as to what factors and which parties were responsible for the fact that some cases were not settled. Witnesses opposing the measure pointed out that for plaintiffs and their counsel the desire to avoid the risks of losing a case altogether, failing to recover either damages or attorney's fees, and facing potential liability for costs, already furnished a substantial incentive to accept a reasonable settlement offer.⁴⁹ In several cases, witnesses reported, government defense attorneys were responsible for prolonging litigation by refusing reasonable settlement offers.⁵⁰ (Neither these government attorneys nor

49. 1981 Hearings, supra note 46, at 614-15, 619-20; 1982 Hearings, supra note 46, at 20, 50-51.

50. Fletcher Farrington, a private practitioner from Georgia, described a case in which a nearby county, against the advice of its lawyers, refused a plaintiff's offer to settle for \$8,000. The case went to trial, and a jury returned a verdict of \$74,000. 1982 Hearings, supra note 46, at 44, 48.

Stephen Ralston of the NAACP Legal Defense Fund, Inc. described a major case against Georgia State Prison officials which continued for seven years and took twenty weeks to try. Finally, after the trial, because of encouragement from the judge, incidents at the prison, and a change in defense counsel, the

(Footnote continued)

their clients would have any new incentives to settle under the Advisory Committee's proposal.) Witnesses at the congressional hearings also raised a series of practical, policy, and ethical questions similar to those identified in this forum.⁵¹

Since members of Congress have heard debate on several proposals to modify the fee-shifting statutes in ways similar to, albeit less drastic than, those advanced here, and have deemed it inadvisable to adopt those proposals, a fortiori such modifications should not be promulgated by the Judicial Conference and the Court.⁵²

50. (continued)

State agreed to settle the case on basically the same terms that the plaintiffs had offered before the trial. 1981 Hearings, supra note 46, at 612-13.

51. See, e.g., 1982 Hearings, supra note 46, at 17-18, 29-31, 52.

52. Those proponents of the Rule 68 proposal who rely heavily on its procedural aspects to argue it is within the scope of the Court's delegated rulemaking authority fail to recognize Congress' increasing use of procedural elements in enacting substantive public laws and policies. The fee statutes are a good example of this legislative trend, so are the environmental protection laws. See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (requiring the preparation of environmental impact statements on all major federal actions significantly affecting the quality of the human environment).

If the purpose of the substance-procedure dichotomy is in part to protect Congress' policy-making domain, and if Congress is increasingly designing substantive public laws with procedural components, members of the Advisory Committee will not be able to rely on a mechanical invocation of Hanna v. Plumer's "rationally capable of classification as procedural" language (380 U.S. 460, 472 (1965)) to ascertain whether their proposals are within the scope of the Court's authority.

D. The Court's Ruling in *Alyeska* Confirms That This Policy Decision Should Be Made By Congress.

The conclusion that this is a substantive policy change of a type appropriate for Congressional consideration is further confirmed by the Supreme Court's 1975 ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*.⁵³ In *Alyeska*, the Court reviewed the American common law rule that each litigant pay his or her own attorney's fees and determined that it would be inappropriate for the judiciary to make "drastic new rules with respect to the allowance of attorneys' fees."⁵⁴ The reallocation of attorney's fees between parties in litigation, the Court held, is a "policy matter that Congress has reserved for itself."⁵⁵ The Court's reasoning is based on jurisprudential considerations, and is consistent with constitutional separation of powers principles and Rules Enabling Act constraints.

Although this year's version of the proposal has been tempered with provisions for the exercise of district court discretion and re-captioned a "sanctions" proposal, these revisions do not significantly alter its character or likely impact. It remains essentially a fee allocation rule, and one

53. 421 U.S. 240 (1975).

54. Id. at 269.

55. Id.

which authorizes district judges to redistribute fee liability in a manner and to an extent that may reduce, offset, or even outweigh congressionally authorized incentives for plaintiffs to bring private suits enforcing public laws. The fact that some district judges will refrain from doing so, or will do so only occasionally, makes the rule no less inconsistent with congressional enactments. In fact, it may lead to the type of non-uniform and relatively standardless judicial decision-making that the Court intended to prohibit in Alyeska.

Nor can it be argued persuasively that re-labelling this fee allocation proposal a proposal for "sanctions" and predicating it upon a finding of "unreasonableness" makes it analogous to the sanctions provisions contained in Rules 11, 26, 30, 37 and 56,⁵⁶ and thus avoids Alyeska's proscription. It is not the title or the label attached to the rule which is determinative in this analysis, but rather its contents. The contents of the proposed rule, as noted above, provide for reallocating fee liability between the parties in a manner quite different from either the American rule or the legislative modifications that Congress has developed. Moreover, the "sanctions" proposed in this Rule 68 context, unlike the sanctions contained in Rules 11, 26, 30, 37, and 56, are not imposed on the basis of actions which obstruct,

56. See Draft Advisory Committee Note, reprinted in 590 F. Supp. at CL (1984).

delay, or mislead during the course of the litigative process. Rather, these Rule 68 sanctions would be imposed when a party has continued his or her use of the litigative process in good faith, rather than opting to settle. Additionally, the new Rule 68 sanctions would be much larger in amount, and imposed upon a lower threshold of "culpability" (i.e. a party's "unreasonableness"), than the sanctions presently contained in the other rules.

Hence, members of the Alliance for Justice submit that the promulgation of these proposed amendments to Rule 68 would exceed the rulemaking authority of the Supreme Court.⁵⁷ For this reason, because the need for the amendments has not been demonstrated, and also because the amendments will adversely impact access to the federal courts, engender a large volume of collateral litigation on "fee sanction" issues, and greatly increase the potential for conflict and other problems in the attorney-client relationship,

57. It is not necessary to reach the question of whether the promulgation of these Rule 68 amendments would exceed not only the statutory authority delegated to the Court under the Rules Enabling Act but also the constitutional limits on the Court's rulemaking authority.

There are, however, serious constitutional questions which would inhere in the promulgation of a rule that amends or repeals an act of Congress, particularly in light of the Court's recent delineation of the character of legislative action and the restrictions on how such action may be taken and by whom. I.N.S. v. Chadha, 103 S. Ct. 2764 (1983). If members of Congress cannot take legislative action by the vote of only one House and without presentment for Presidential signing, then it would seem to follow a fortiori that the Judicial Conference and the Court can't take legislative action absent a vote by either House or presentment to the President.

the proposal should be withdrawn.

IV. The Proposed Amendments Will Have an Adverse Impact on Access to the Courts.

This year's proposal to amend Rule 68 will, like last year's, decrease access to the courts for less affluent litigants, including individuals and small businesses and organizations. Although the proposal has been rewritten to include a "reasonableness" standard and to explicitly allow a district court to consider the burden on a litigant in determining the amount of a sanction, many litigants of limited means will be reluctant to risk potential liability for a sanction calculated on the basis of a defendant's fees and costs. They will have no way of predicting, at the time when they file the suit or weigh the first settlement offer, whether the district judge will find their actions reasonable, or whether the judge will determine that a sanction might pose a burden for them.

The facts of the Marek v. Chesny case,⁵⁸ now pending in the Supreme Court, provide an excellent empirical example of why the "reasonableness" standard will fail to afford plaintiffs any meaningful protection. Chesny is a civil rights and wrongful death action brought by the father of a young man killed by police gunfire. Approximately six months before trial, the three

58. No. 83-1437 (U.S. argued Dec. 5, 1984).

officers involved made a Rule 68 offer to settle the case for \$100,000 inclusive of attorney's fees and costs (which at that point totalled approximately \$32,000).⁵⁹ Mr. Chesny and his attorney thought the offer was unreasonably low, and rejected it. A few days later, unaware of the Rule 68 offer or its rejection, the district judge talked with the parties about settlement during a pretrial conference. He opined that a \$100,000 figure mentioned by the defendants' counsel was unreasonably low, and a \$500,000 figure mentioned by plaintiff's counsel was unreasonably high, and mentioned amounts in the \$250,000 to \$400,000 range for the parties' consideration.⁶⁰ The parties could not agree, and the case went to trial several months later. The jury came back with a verdict of \$60,000 (inclusive of \$1,000 in punitive damages against each officer).⁶¹ In opposing the defendants' motion for attorney's fee sanctions for his client's failure to settle,⁶² plaintiff's counsel reminded the district judge that at a pretrial

59. Chesny v. Marek, 547 F. Supp. 542, 545 (N.D. Ill. 1982); Jt. App. at A-3 to 9, A-16 to 17, Marek v. Chesny, No. 83-1437 (U.S.).

60. Record, Document No. 157 (Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Post-Trial Motions and in Support of Defendant's Post-Trial Motion) at 1-3, and Ex. A thereto, Marek v. Chesny, No. 83-1437 (U.S.).

61. Petitioners' Brief at 4, Marek v. Chesny.

62. This motion was based on an argument by the defendants that the existing language in Rule 68 could be construed, together with the existing language in 42 U.S.C. § 1988, as providing attorney's fee sanctions for declining to settle. See Chesny, 547 F. Supp. at 545-48.

conference he had shared in the assessment that \$100,000 was unreasonably low.⁶³ The district judge rejected the reminder, and termed the offer "a good faith attempt to settle the action and not simply a sham designed to invoke Rule 68."⁶⁴

The facts in Chesny highlight both the subjectivity of the "reasonableness" determination, and the possibility that a district judge will view a settlement offer with hindsight very differently than he or she might have viewed it contemporaneously (and very differently than the parties might have viewed it contemporaneously). Litigants who don't want to risk liability for sanctions will be well-advised to settle when the first offer that is not clearly a "sham" offer is made, or alternatively, not to file suit.

Additionally, because the rule will be highly subjective in its application, plaintiffs whose claims are regarded as novel, less worthy, or unimportant by some district court judges will be more likely to incur sanctions, and more likely to incur them in larger amounts. Plaintiffs who seek to litigate claims against the government may face this type of problem, and also an additional inequality introduced by the fact that although governmental defendants may seek sanctions against plaintiffs for

63. See Record, Document No. 157 and Ex. A thereto, supra note 60.

64. Chesny, 547 F. Supp. at 546.

refusing to settle, some defendants will take the position that under doctrines of sovereign immunity governmental defendants do not have to pay monetary sanctions unless liability is imposed by statute (not court rule).⁶⁵

For all of these reasons, and because the proposal will reduce or eradicate incentives for plaintiffs to sue under those laws that include asymmetrical fee-shifting provisions (see Part II, above), one long range effect of the proposal's adoption will be to discourage persons with meritorious federal statutory and constitutional claims from vindicating their rights, and to discourage attorneys from representing them.

V. The Proposed Amendments Will Engender a Large Volume of Collateral Litigation.

It is possible, on the one hand, that if the proposal is adopted, there will be an increase in the number of cases that settle and a decrease in the number of cases that go to trial. If this occurs, the federal courts will less frequently articulate and enforce legal norms in our society. Members of the Alliance would submit, as some commentators have pointed out,⁶⁶ that the Chief Justice and the Judicial Conference should not be seeking to increase the number of "case settlements" achieved at the cost of

65. See Justice Department Comments, *supra* note 21, at 3-5.

66. See Fiss, Against Settlement, 93 Yale L.J. 1073 (1984).

diminishing the courts' historic, constitutional role.

On the other hand, it is also possible that if the proposal is adopted, a significant number of litigants will continue to reject settlement offers and to seek adjudications of their cases on the merits. If this occurs, then considerable litigation on collateral fee and sanctions issue will ensue. The incentive to litigate these issues, for those litigants who do not settle, will be substantial, because the amount of the sanction to be assessed may well be sizeable. Moreover, the six factors listed in the draft amendments for determining the reasonableness of a party's decision to reject a settlement offer are all highly subjective (e.g., "the closeness of the questions of law and fact at issue," "whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer," and "whether the suit was in the nature of a 'test-case'..."). When these six factors are read in combination, they suggest a scope of relevant proof and discovery on the Rule 68 "sanctions" issue broader than discovery and proof on the merits of the case itself.

In addition, numerous procedural questions will arise in the course of Rule 68 "sanctions" litigation: For example, what discovery should be allowed prior to the hearing on sanctions? Can a party seek to obtain or disclose privileged attorney-client communications or attorney work product material in support of or in opposition to a sanctions motion? Should the answer depend, in

whole or in part, on whether an appeal or related case is still pending? Should the question, when it arises, of whether an attorney is liable for all or part of a sanctions award be resolved in the same hearing, or in another collateral proceeding? If the question is to be resolved in the same proceeding, how can that attorney represent his or her client without possible conflict during the sanctions proceeding?

As noted in the introduction to this testimony, the Alliance for Justice will discuss a number of these issues (including those outlined in Part VI, below), which have a particularly critical impact on the attorney-client relationship, in written comments to be filed following the hearing. Suffice it to note here, however, that the adoption of the Rule 68 proposal might well result in both a decrease in judicial resources devoted to interpreting the Constitution and federal laws, and an increase in judicial resources devoted to adjudicating collateral fee and sanctions issues. It is difficult to understand how citizens, judges, legal scholars, members of the legal profession, or legislators would be willing to countenance such a development, let alone support a proposal that would invite it.

VI. The Proposed Amendments Will Significantly Increase the Potential for Conflict and Other Problems in the Attorney-Client Relationship.

As noted above, in written comments to be submitted after the

hearing, the Alliance for Justice will analyze the ways in which the Rule 68 proposal, if adopted, will increase the potential for conflict and other problems in the attorney-client relationship. At least three primary areas of impact on the attorney-client relationship merit the Advisory Committee's consideration.

First, although neither the text of the proposed amendments nor the Advisory Committee Note addresses this point, it seems likely that parties litigating the reasonableness of an offer's rejection (in order to recover a monetary sanction) will seek to obtain and disclose information relevant to the reasonableness issue that is contained in privileged attorney-client communications and confidential work product material. Disclosures of this type may be numerous, and particularly problematic if an appeal or related case is still pending while the reasonableness issue is being adjudicated.

Second, the draft Committee Note accompanying the 1984 proposal permits either party to demand simultaneous negotiation of the merits and the fee award in litigation covered by fee-shifting statutes.⁶⁷ This aspect of the proposal is likely to be particularly problematic for plaintiffs' counsel, and particularly controversial in those jurisdictions that have recognized simultaneous negotiation as raising severe ethical

67. Draft Committee Note, paragraph 5, reprinted in 590 F. Supp. at CXLVIII (1984).

difficulties.⁶⁸

Third, as noted above in Part V, in cases in which a monetary sanction for the refusal to settle is assessed, there is likely to be substantial conflict, and possibly collateral litigation, between the sanctioned party and his or her lawyer as to who should be liable for the sanction. Although the decision as to whether or not to accept a settlement offer is one for the client to make (see Rule 1.2(a), A.B.A. Model Rules of Professional Conduct), many clients rely heavily upon the recommendations of their attorneys. When the sanction at issue is several thousand or several hundred thousand dollars, the client and attorney involved may seek a judicial resolution of any dispute as to who is liable and for what portion of the sanction award. This will engender numerous substantive, procedural, and ethical problems.

The overall impact of these problems may be, in part, to discourage attorneys from representing clients in suits to vindicate constitutional and federal statutory rights, at least in the federal courts. Moreover, to the extent that federal rules are often used as a model in state court rulemaking, these problems will be replicated in state forums.

68. See, e.g., Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980), cert. denied sub nom. Sanchez v. Tucson Unified School District, 450 U.S. 912 (1981); Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3rd Cir. 1977); see also Opinion No. 80-94 of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, 36 Record of the N.Y.C.B.A. 507 (1981).

Conclusion

For all of the foregoing reasons, the Alliance for Justice submits that the Advisory Committee should withdraw its proposal to amend Rule 68.

April 5, 1985

Honorable Edward T. Gignoux
Chairman, Committee on Rules of
Practice and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Judge Gignoux:

The Attorney General has asked me to respond on behalf of the Department of Justice to the Committee's invitation for comments concerning the proposed amendments to the Federal Rules of Civil Procedure. We have comments on the proposed amendments to Rule 4(d)(4), Rules 4(i), 28 and 44, Rule 68, and Admiralty Rules C and E.

I. RULE 4(d)(4) (SERVICE ON U.S. ATTORNEYS)

Proposed Rule 4 would allow service of process upon United States Attorneys by registered mail rather than the present requirement of personal service. The Department generally supports this proposal. However, we are concerned about its application to the larger U.S. Attorney offices where, in the absence of language providing that such registered service is to be made to the attention of a designated person or position, such process could subject the United States to entry of default judgments because the process was misdirected by their mailrooms. We therefore request that the proposed amendment contain the following language:

". . .by sending a copy of the summons and of the complaint by registered or certified mail addressed to the Civil Process Clerk of the United States Attorney's office."

In addition, because of the particular time pressures in cases where preliminary relief is sought, we urge that the Committee Note make it clear that (1) the change does not absolve a plaintiff seeking preliminary relief from his duty to give the defendant prompt notice of the application and (2) service by mail is not to be used as a device to shorten a defendant's time to prepare for a hearing on an application for preliminary relief.

II. RULES 4(i), 28 and 44 (TRANS-NATIONAL LITIGATION)

We generally support the proposed amendments to Rules 4(i), 28 and 44, but we would suggest some clarifying and technical amendments. The proposed amendments are intended "to clarify the availability to litigants in trans-national litigation of simplified and useful procedures provided by conventions and treaties to which the United States is a party." We believe, however, that as written the proposed amendment to Rule 4(i) would not clarify the situation.

Rule 4(i) currently describes the appropriate means of service on persons in a foreign country in those situations where Rule 4(e) authorizes extraterritorial service. The proposed amendment would add to the methods of service presently described, service "pursuant to any applicable treaty or convention." The only such treaty or convention to which the United States is a party is the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. The Convention provides, however, that the Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extra judicial document for service abroad." (Article 1, emphasis added.)

Confusion may be created by the proposed Rule 4(i) amendment unless it or the Committee Note make clear its relationship with the Hague Convention. Since the Convention provides for exclusive use of its procedures as between state parties, we suggest that the amendment be modified to indicate that in the event of conflict the Convention controls among states that are parties to it. An alternative to changes in the Rule itself would be a more detailed discussion in the Committee Note of the relationship between the Convention and the Rule. 1/

We also suggest some technical amendments. Proposed Rule 4(i)(1)(B) employs the term "letter of request" to cover procedures under applicable treaties. While this term is used in the Hague Evidence Convention, it is not employed in the Hague Service Convention, which uses "requests for service" (Art. 2) and "request conforming to the model annexed to the present convention" (Art. 3). We therefore suggest that Rule 4(i)(1)(B) be amended to read:

as directed by the foreign authority in response to a letter rogatory, a letter of request or a request under any applicable treaty or convention.

1/ The conventions that apply to Rules 28 and 44 do not provide for exclusive use of their procedures, unlike the convention relating to service of process, and therefore the proposed amendments to Rules 28 and 44 are not subject to the same problem.

Similarly, we concur with the proposed amendment to Rule 28(b) that adds procedures provided in applicable treaties. However, in order to differentiate between letters rogatory and letters of request under the Hague Evidence Convention, we suggest that Rule 28(b) be amended to read:

...or (3) pursuant to a letter rogatory or (4) pursuant to a letter of request under any applicable treaty or convention.

III. RULE 68 (OFFER OF SETTLEMENT)

The proposed amendments to Rule 68 would replace the current offer of judgment procedure with an "offer of settlement" procedure. A party would be given 60 days within which to accept a formal Rule 68 offer. If the offer is not accepted, the offeror could make a motion, within 10 days after entry of judgment, seeking the imposition of sanctions on the offeree on the ground that the offer was rejected unreasonably. In determining the issue of reasonableness, the court would be required to consider all relevant circumstances at the time of the rejection, including several that would be spelled out in the rule. Regarding the amount of the sanction to be imposed, the court would consider the extent of the resultant delay, the attorneys' fees and other expenses incurred by reason of the failure to accept the offer, the amount of interest lost by the offeror, and the burden on the offeree. Unlike current Rule 68, the amended Rule 68 procedure would be available to both plaintiffs and defendants.

The Justice Department opposes the Rule 68 proposal because a rule change of this nature and magnitude should be made by Congress and, on the merits, because the change would result in more costs to the litigation system than benefits. In any event, the rule change cannot be made applicable to the United States because it has not waived its sovereign immunity.

A. Proposed Rule 68 Should Not Be Adopted Through Judicial Conference Rulemaking: Such Fundamental Changes In The Allocation of Litigation Costs Should Be Made Only By Congress.

The Department does not believe that Judicial Conference rulemaking is the appropriate process for developing a "procedural" rule that would have the substantive effect of drastically reallocating the costs of litigation in the federal courts. As the Supreme Court concluded when it declined to create a "private attorney general" exception to the "American Rule" on attorneys' fees, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), Congress is the appropriate forum for making such fundamental policy determinations as where litigation burdens should fall:

We are asked to fashion a far-reaching exception to this "American Rule"; but having considered its origin and development, we are convinced that it would be inappropriate

for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.

* * * *

[I]t is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.

421 U.S. at 247, 271.

Congress has deeply and repeatedly involved itself in the policy area that the Judicial Conference now considers "invading". By providing for attorneys' fee awards in various fee-shifting statutes, Congress has created policies on the allocation of the costs of litigation and on the burdens and societal benefits of private enforcement. Proposed Rule 68 would conflict with these policies, specifically with the fee-shifting laws, such as the Clayton Act and the civil rights laws, that entitle the prevailing plaintiff to reasonable attorneys' fees but withhold such relief from the prevailing defendant. In cases arising under these laws, the proposed rule would operate asymmetrically by providing the defendant with the opportunity to obtain attorneys' fees but extending no corresponding benefit to the plaintiff, who by statute is already entitled to attorneys' fees if he prevails in the lawsuit.

Since Congress has in effect pre-empted this policy area, we recommend that if the Judicial Conference wishes to proceed with this Rule 68 proposal or another proposal similar in substance, it should not submit the proposal to the Supreme Court, but rather arrange for its introduction in Congress.

B. The Costs Of Proposed Rule 68 Would Outweigh Its Benefits.

The Department fully shares the Advisory Committee's concern about the proliferation of costly and lengthy civil litigation. Frivolous lawsuits are brought all too frequently, burdening the courts and imposing unjustified litigation expenses. Various groups across the country have been wrestling with the problem of devising fair and effective alternative ways of resolving disputes more swiftly and at less cost to the parties than is possible under our present system. The Department strongly believes that the process of exploring such alternatives is of crucial importance to our judicial system.

We also recognize that Rule 68 in its present form has not been widely used to encourage settlements. It applies to settlement offers made by defendants but not by plaintiffs. The only sanction is the award of court costs, which generally do not include defendants' attorneys' fees and frequently are too small to be a significant factor in motivating settlements. And even that limited sanction becomes unavailable to the defendant if the plaintiff, after failing to accept a Rule 68 offer, loses the case entirely. Delta Air Lines, Inc. v. August, 450 U.S. 346

(1981) (Rule 68 sanction can be invoked only when plaintiff prevails as to some part of claim, but recovers less than amount or value of defendant's settlement offer).

Nonetheless, the Department must oppose the Rule 68 proposal on its merits because we believe that it would result in more costs than benefits for the litigation system. The witnesses at the recent public hearings on these Federal Rules proposals, as well as other public commenters, have fully discussed the proposal's objectionable aspects. Accordingly, we will not discuss them in any detail here, but will only briefly summarize them:

° Increased post-trial "satellite" litigation on sanctions. The admirable purpose of the proposal is to reduce litigation by encouraging earlier settlements. We believe, however, that the rule change would be counter-productive. While there may be a moderate increase in settlements, that increase might well be offset, or even overshadowed, by greatly increased post-trial litigation on sanctions. The litigation system has seen a recent proliferation of "satellite" proceedings on attorneys' fees, and this proposed change would only accelerate that trend and increase the congestion in the courts.

° Granting excessive discretion to judges to award sanctions. Under existing fee-shifting statutes, cases awarding attorneys' fees are frequently marked by confusion over the proper bases for fee awards and waste of judicial resources in determining the proper award. Although proposed Rule 68 would appear to provide more guidelines than some of the statutes, these guidelines are only "factors to be considered" and may thus in fact be illusory, as the court in its discretion decides the issue of unreasonableness. The problems characterizing attorneys' fee litigation may therefore also plague Rule 68 proceedings, thus frustrating its purpose of reducing litigation. 2/

° Injury to attorney-client relations. Post-trial hearings on the reasonableness of a settlement offer rejection would necessarily involve consideration of counsel's advice on the reasonableness of the offer and review of other attorney-

2/ The result might well be, as Justice Brennan said in the context of attorneys' fee litigation, "a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake." *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1951 (1983) (Brennan, J., concurring in part and dissenting in part).

client communications during the settlement process. This would repeatedly place the attorney-client privilege at issue and, to the extent the privilege is waived, the attorney-client relationship would be weakened. Conflict and possible litigation over liability for the sanction are also likely between a sanctioned offeree and his or her attorney.

° Interference with relations between opposing counsel and disruption of the settlement process generally. At best, the proposed rule would likely make the settlement process unnecessarily formal, as opposing counsel would attempt to "make their record" during settlement talks in anticipation of post-trial sanctions hearings. At worst, settlement talks would be reduced to gamesmanship, weakening the trust and goodwill between opposing counsel that so often leads to settlement. In any event, as with the attorney-client privilege, the confidentiality of settlement talks would be sorely tested. In short, Rule 68 offers might well create an atmosphere of distrust that would make settlements more difficult.

° Weakening of the settlement role of the judge. Judges often play a useful mediation role during settlement talks. It appears likely that judges would reduce this role under the proposed rule in anticipation that they might have to conduct a post-trial proceeding on the settlement talks.

° Interference with fee-shifting statutes. As discussed in Point A above, proposed Rule 68 would conflict with fee-shifting statutes favoring plaintiffs because the sanctions authorized by the rule would be equally available against plaintiffs and defendants.

In addition to these specific objections to the Rule 68 proposal, we also observe that recent amendments to other Federal Rules are now available to help promote settlements. For example, Rule 16 has been amended to list settlement as a subject to be discussed at pre-trial conferences. The early involvement of the court in supervising and prompting the discovery process, by such steps as issuing scheduling orders, should also increase the possibilities for settlement because adequate discovery generally is necessary before settlement options can be evaluated. The Rule 16 innovations are designed to produce an environment where profitable settlement negotiations will flourish, in contrast to the threats to the settlement process presented by proposed Rule 68.

Finally, we note that existing Rule 68 has some benefits that would be lost under the proposed rule. The current rule's "bright line" approach of requiring an offeree to pay costs if he recovers less than an offer he rejected has the advantages of definiteness in the circumstances in which it applies and relative ease in calculating the amount of costs. The Justice Department has used Rule 68 effectively in some of our litigation to encourage plaintiffs to settle and to have costs imposed on those who unreasonably refuse to settle. We

would oppose the deletion of the current requirement that the offeree "pay the costs" of the litigation if he rejects a settlement but does no better at trial.

We also favor existing Rule 68 because it serves as a basis for appropriately limiting attorneys' fee awards under fee-shifting statutes. We believe that plaintiffs who unreasonably reject settlement offers should thereafter bear the costs of the action, including their own attorneys' fees. Accordingly, they should not be entitled under a fee-shifting statute to recover attorneys' fees incurred after such a rejection. The Supreme Court is presently considering, in Marek v. Chesny (No. 83-1437), the argument that, because 42 U.S.C. § 1988 includes attorneys' fees as part of costs and because Rule 68 currently provides that an offeree who recovers less than a settlement offer he rejected must "pay the costs incurred after the making of the offer," a plaintiff who rejects an offer and recovers less at trial is not entitled to an attorneys' fee award. Because the proposed amendment to Rule 68 makes no reference to "costs" in this context, it might inadvertently undermine this limitation on attorneys' fee awards.

In conclusion, we share the desire of the Advisory Committee to make Rule 68 more effective. By no means do we intend to suggest by our comments on this proposal that we would oppose all future proposals on Rule 68. We simply must oppose this particular proposal because we believe that its costs clearly would outweigh its benefits.

C. The Rule Cannot And Should Not Apply To The United States.

1. The United States Has Not Waived Its Sovereign Immunity.

Absent a congressional waiver of immunity, sovereign immunity bars any order or judgment against the United States or its agencies if the order requires the payment of funds from the public treasury. Thus, proposed Rule 68 cannot apply to the United States because the United States cannot be made liable for monetary sanctions in the absence of a statute waiving sovereign immunity. Accordingly, if proposed Rule 68 is adopted, we recommend that to prevent confusion the rule expressly exempt the United States.

The Rules Enabling Act, 28 U.S.C. 2072, makes it clear that rules promulgated by the Supreme Court "shall not abridge, enlarge or modify any substantive right." See Sibbach v. Wilson, 312 U.S. 1, 7-8 (1941). In particular, the authority given the Court by that Act "to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction." United States v. Sherwood, 312 U.S. 584, 589-91 (1941); see also Sibbach v. Wilson, supra, 312 U.S. at 10 (court rules may not "extend or restrict the jurisdiction conferred by a statute"). It is well established that sovereign immunity is jurisdictional (see, e.g., Soriano v. United States, 352 U.S.

210, 216 (1957)) and that "the terms of [the sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, *supra*, 312 U.S. at 586. And a court may not impose a monetary penalty upon the United States under the Federal Rules in the absence of an explicit waiver of sovereign immunity. See Land v. Dollar, 330 U.S. 731, 738 (1947) (absent a legislative waiver of sovereign immunity, a court has no power to make an award which would "expend itself on the public treasury or domain"); see also United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980). Therefore, a Federal Rule cannot by itself empower a court to impose a monetary remedy against the government.

Waivers of sovereign immunity must be strictly construed in favor of the United States:

Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees [citation omitted]. Waivers of immunity must be "construed strictly in favor of the sovereign," [citation omitted] and not "enlarge[d] . . . beyond what the language requires" [citation omitted]. In determining what sorts of fee awards are "appropriate," care must be taken not to "enlarge" [the particular statute's] waiver of immunity beyond what a fair reading of the language of the section requires.

Ruckelshaus v. Sierra Club, 103 S. Ct. 3274, 3277 (1983). Moreover, waivers "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969).

We are confident that no existing statutory waiver of the United States' sovereign immunity would extend to proposed Rule 68. The Equal Access to Justice Act, the broadest fee-shifting statute applicable to the United States, makes the United States liable for the reasonable fees and expenses of attorneys only "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. 2412(b) (emphasis added). However, since a procedural rule promulgated by the Supreme Court is not a statute, ^{3/} section 2412(b)'s waiver of sovereign immunity would not authorize the award of attorneys' fees, expenses or other sanctions against the United States under Rule 68. That specific and limited waiver simply cannot, under the Ruckelshaus strict construction rule, be construed to extend to what would be a judicially-created rule expanding drastically the exposure of the United States to attorneys' fee awards and other sanctions.

^{3/} Founding Church of Scientology v. Bell, 603 F.2d 945, 952 (D.C. Cir. 1979); Walko Corp. v. Burger Chef Systems, Inc., 554 F.2d 1165, 1168 n.29 (D.C. Cir. 1977).

2. Rule 68 Sanctions Would Be Inappropriate
In Many Cases Involving The United States.

There are many types of cases in which it would be inappropriate to impose Rule 68 sanctions against the United States. In many lawsuits that involve issues of public policy, the Government's actions should not be constrained by the threat of Rule 68 sanctions.

The possibility that Rule 68 could be applied in suits for equitable relief could seriously interfere with the Government's ability to carry out its law enforcement responsibilities to the public. Defendants in injunctive suits brought by the United States often offer limited relief as a settlement. The Government should not be forced to accept the threat of liability for the offeror's legal fees, or other sanctions, as the price of pursuing relief it considers essential to protect the public interest -- and offerors should not be afforded such a weapon to wield.

Much government litigation cannot be quantified. Settlement of such actions is difficult because government policy affecting the public and non-parties is at issue. The non-monetary nature of the subject matter would make it difficult to compare a settlement offer with a final judgment to determine the reasonableness of the offer or of the rejection. And governmental privilege and confidentiality could hamstring our defense of the reasonableness of any rejection of a settlement offer.

IV. ADMIRALTY RULES C AND E

The proposed amendments to Admiralty Rules C and E would allow only a U.S. Marshal to arrest a vessel but allow a special appointee to arrest other property in an admiralty proceeding. A modification proposed by the Maritime Law Association (MLA) would expand the Marshal's exclusive arrest powers to include the vessel and any "property" on board.

The Department endorses the proposed amendment and the MLA modification. However, to avoid any confusion, we suggest that the Committee Note state that the word "property" includes cargo, bunkers and other equipment. The last sentence of the Note could read:

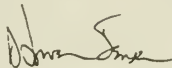
However, since successful arrest of a vessel or property on board a vessel, which includes cargo, bunkers, and other equipment, frequently requires the enforcement presence of an armed Government official and the cooperation of the United States Coast Guard and other governmental authorities, the provision that the arrest of a vessel or property on board the vessel must be by a Marshal is continued. (Changes underlined.)

V. CONCLUSION

In summary, the Department of Justice supports the proposed amendments to Rule 4(d)(4), Rules 4(i), 28 and 44 and Admiralty Rules C and E, but opposes the Rule 68 proposal.

We very much appreciate the opportunity to comment on these important proposals and would be pleased to submit any additional or clarifying comments that the Committee might request.

Sincerely,



D. Lowell Jensen
Acting Deputy Attorney General

U.S. Department of Justice
Office of the Deputy Attorney General

11. Deputy Attorney General

Washington, D.C. 20530

February 28, 1984

Honorable Edward T. Gignoux
Chairman, Committee on Rules of
Practice and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Judge Gignoux:

The Attorney General has asked me to respond on behalf of the Department of Justice to the Committee's invitation for comments concerning the proposed amendments to the Federal Rules of Civil Procedure. As the most frequent litigant before the federal courts, the Department has a keen interest in the Federal Rules and their amendment. We comment below on the proposed amendments to Rules 68, 71A, 83 and Admiralty Rules B, C and E. Because we are most concerned about the Rule 68 proposal, we address it first.

I. RULE 68 (OFFER OF SETTLEMENT)

The proposed amendments to Rule 68 would make its existing offer of judgment procedure available to plaintiffs, as well as defendants; allow the offeree 30 days, instead of 10 days, to consider whether to accept; and provide that if the judgment finally entered is not more favorable to the offeree than the unaccepted offer, the offeree must pay the offeror's costs, expenses and reasonable attorneys' fees incurred after the making of the offer, plus interest on the amount of the offer to the extent such interest is not included in the judgment. The amendments would rename the procedure the "offer of settlement" procedure.

The amended Rule 68 would also provide that costs and expenses otherwise due under the Rule could be reduced by the court if found to be excessive or unjustified under all of the circumstances and should not be awarded at all if the offer was made in bad faith. In determining whether a final judgment is more or less favorable to the offeree than the offer, the costs and expenses of the parties are to be excluded from consideration.

A. Proposed Rule 68 Should Not Be Adopted Through Judicial Conference Rulemaking: Fundamental Changes In The "American Rule" Should Be Made Only By Congress.

The Department of Justice opposes this Rule 68 proposal because it does not believe that Judicial Conference rulemaking is the appropriate process for developing a "procedural" rule that would have the substantive effect of drastically reallocating the costs of litigation in the federal courts. Proposed Rule 68 represents nothing less than a substantial evisceration of the "American Rule" that a prevailing litigant generally may not collect attorneys' fees from the losing party. As the Supreme Court concluded when it declined to create a "private attorney general" exception to the American Rule, Alveska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), Congress is the appropriate forum for making such fundamental policy determinations as where litigation burdens should fall. We quote several passages from the Supreme Court's decision:

We are asked to fashion a far-reaching exception to this "American Rule"; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.

* * * *

. . . [I]t is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.

* * * *

We do not purport to assess the merits or demerits of the "American Rule" with respect to the allowance of attorneys' fees. It has been criticized in recent years, and courts have been urged to find exceptions to it But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.

421 U.S. at 247, 262, 270-71.

We therefore recommend that the Judicial Conference, if it wishes to proceed with this Rule 68 proposal or another

proposal similar in substance, should not submit the proposal for Supreme Court rulemaking, but rather arrange for its introduction in Congress.

B. The Rule Cannot And Should Not Apply To The United States.

1. The United States Has Not Waived Its Sovereign Immunity.

We also oppose the proposed draft of Rule 68 because we dispute the apparent assumption set forth in the Committee Note that the amended Rule 68 would apply to the United States. The Note refers to the Government in the context of the time needed to consider the offer of settlement. However, as discussed below, the United States cannot be made liable either for attorneys' fees and related expenses (other than costs awardable pursuant to 28 U.S.C. 2412(a)) ^{1/} or interest, ^{2/} in the absence of a statute waiving sovereign immunity. Proposed Rule 68, if applicable to the United States, would thus attempt to make substantive changes in applicable law and would be invalid. Accordingly, if proposed Rule 68 is adopted, we recommend that to prevent confusion the Rule expressly exempt the United States.

The Rules Enabling Act, 28 U.S.C. 2072, makes it clear that rules promulgated by the Supreme Court "shall not abridge, enlarge or modify any substantive right." See Sibbach v. Wilson, 312 U.S. 1, 7-8 (1941). In particular, the authority given the Court by that Act "to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction." United States v. Sherwood, 312 U.S. 584, 589-91 (1941); see also Sibbach v. Wilson, supra, 312 U.S. at 10 (court rules may not "extend or restrict the jurisdiction conferred by a

^{1/} 28 U.S.C. 2412(a) expressly excludes attorneys' fees from the costs awardable pursuant to that section unless they are "otherwise specifically provided for by statute."

^{2/} Under 28 U.S.C. 2411 and 28 U.S.C. 1961, interest may run against the United States only after a judgment is final. Moreover, in Federal Tort Claims Act suits and other kinds of litigation, the permissive statutory language is sharply limited by the provisions of 31 U.S.C. 1304. Thus, interest is payable on a judgment under the Federal Tort Claims Act only when the United States appeals a judgment and the judgment is affirmed, and only from the date of filing of a transcript of the judgment with the General Accounting Office, whichever is later. Reminga v. United States, 695 F.2d 1000 (6th Cir. 1982); Rooney v. United States, 694 F.2d 582 (9th Cir. 1982).

statute.") It is well established that sovereign immunity is jurisdictional (see, e.g., Soriano v. United States, 352 U.S. 270, 276 (1957)) and that "the terms of [the sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, *supra*, 312 U.S. at 586. And a court may not impose a monetary penalty upon the United States under the Federal Rules in the absence of an explicit waiver of sovereign immunity. See Land v. Dollar, 330 U.S. 731, 738 (1947) (absent a legislative waiver of sovereign immunity, a court has no power to make an award which would "expend itself on the public treasury or domain"); see also United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980). Therefore, a Federal Rule cannot by itself empower a court to impose a monetary remedy against the government.

The United States has not waived its sovereign immunity against attorneys' fee awards in general, but only to the specific extent set forth in various statutes. See, e.g., Equal Access to Justice Act (1980), 28 U.S.C. 2412(b), Pub. L. 96-481, title II (94 Stat. 2325); Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. 1988, Pub. L. 94-559, §2 (90 Stat. 2641). And it is clear that interest is not recoverable from the United States in the absence of legislation waiving sovereign immunity and specifically authorizing such recovery. 3/ As the Supreme Court recently reiterated in Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (July 1, 1983), waivers of sovereign immunity must be strictly construed in favor of the United States:

Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees [citation omitted]. Waivers of immunity must be "construed strictly

3/ United States v. Alcea Band of Tillamocks, 341 U.S. 48, 49 (1951); United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588 (1947); United States v. Goltra, 312 U.S. 203, 207 (1941); United States ex rel. Argarcia v. Bayard, 127 U.S. 251, 260 (1888). Congress recently rejected an attempt to impose pre-judgment interest on the United States. During consideration of legislation ultimately enacted as the Federal Courts Improvement Act of 1982, the Senate Judiciary Committee proposed an amendment to 28 U.S.C. 1961 that would have authorized recovery of prejudgment interest generally and applied the proposed prejudgment interest rules to the United States. S. 1700, Sec. 302, 97th Cong., 1st Sess. These provisions were eliminated from the measure by means of a floor amendment after the Office of Management and Budget lodged an objection on behalf of the Administration. 127 Cong. Rec. S14699-14701 (Dec. 8, 1981).

in favor of the sovereign," [citation omitted] and not "enlarge[d] . . . beyond what the language requires" [citation omitted]. In determining what sorts of fee awards are "appropriate," care must be taken not to "enlarge" [the particular statute's] waiver of immunity beyond what a fair reading of the language of the section requires.

103 S.Ct. at 3277.

We are confident that no existing statutory waiver of the United States' sovereign immunity would extend to proposed Rule 68. The Equal Access to Justice Act, the broadest fee-shifting statute applicable to the United States, makes the United States liable for the reasonable fees and expenses of attorneys only "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. 2412(b) (emphasis added). However, since a procedural rule promulgated by the Supreme Court is not a statute, 4/ section 2412(b)'s waiver of sovereign immunity would not authorize the award of attorneys' fees and expenses against the United States under Rule 68. That specific and limited waiver simply cannot, under the Ruckelshaus strict construction rule, be construed to extend to what would be a judicially-created rule expanding drastically the exposure of the United States to attorneys' fee awards.

2. The Expenses Sanction Would Be Inappropriate
In Many Cases Involving The United States.

There are many types of cases in which it would be inappropriate to impose Rule 68 sanctions against the United States. Many lawsuits involve issues of public policy where the Government's actions should not be constrained by the threat of Rule 68 sanctions. For example, in cases involving the proper interpretation or application of an agency rule, the Government should be free, without risking the imposition of Rule 68 sanctions, to press for the interpretation or application sought by the agency even though the Government attorneys may be uncertain about the likely outcome. Absent the relatively infrequent situation in which the United States can concede the invalidity of the ruling or regulation, settlement on a negotiated basis is generally impossible, and acceptance of an offer of settlement or the making of a counteroffer by the United States would not be viable options.

4/ Founding Church of Scientology v. Bell, 603 F.2d 945, 952 (D.C. Cir. 1979); Walko Corp. v. Burger Chef Systems, Inc., 554 F.2d 1165, 1168 n.29 (D.C. Cir. 1977).

Moreover, the possibility that Rule 68 could be applied in suits for equitable relief could seriously interfere with the Government's ability to carry out its law enforcement responsibilities to the public. Defendants in injunctive suits brought by the United States often offer limited relief as a settlement. For example, in an antitrust case involving a merger, the defendant might offer to sell particular assets of the acquired firm. The Government should not be forced to accept the threat of liability for the offeror's legal fees, as the price of pursuing relief it considers essential to protect the public interest -- and offerors should not be afforded such a weapon to wield.

Similar problems would arise in damage suits against the United States of nationwide significance, such as swine flu litigation, radiation cases, and toxic tort suits, where a primary consideration of the United States with regard to settlement has been the impact of a settlement on related cases. Recovery by the plaintiff is far from assured in such cases because of problems in finding a viable theory of liability and establishing causation. Yet, assuming arguendo that amended Rule 68 would apply, presumptive liability for expenses would attach for failure to accept an offer of settlement, subject to reduction in the discretion of the court. Moreover, the option of making a counteroffer, a basis for requesting a discretionary reduction of an award cited in the Advisory Committee Note, would generally not be available in these types of cases at least until it became evident as a result of judicial decisions that the United States had substantial exposure on the issue of liability.

In sum, we do not believe it is reasonable for the United States -- whose settlement decisions in many types of cases involving public policy issues simply cannot be limited or reduced to monetary considerations -- to be forced to speculate about its adversaries' future litigation activities and thus subjected to the coercion implicit in such considerations that are unrelated to the merits of the case.

If Rule 68 is made applicable to the United States despite our objections, we would urge that specific reference be made in the Committee Notes to the model established by the Equal Access to Justice Act pursuant to which the United States should have the opportunity to prove substantial justification for its refusal to compromise as one factor that the court, in its discretion, should apply. There are many times in litigation when a federal agency, particularly in defending one of its rules, should not accept an offer to compromise, even if its rule is subsequently invalidated by the judgment. Under the Equal Access to Justice Act, the agency (the non-prevailing party in this instance) still has an opportunity to prove substantial justification for its position and, if successful, avoid the payment of attorneys' fees. The Committee Note on proposed Rule 68 recognizes that "[n]othing in the rule affects the court's

statutory authority to award attorneys' fees to a prevailing party in certain types of cases," and that "the rule's express grant of discretion to the judge should protect against any award that is 'unjustified under all of the circumstances'." The Committee goes on to say that this "discretion should assure that awards under this rule do not frustrate the various policies of the fee statute." Thus, specific reference to the United States' opportunity to prove substantial justification is appropriate.

3. The Rule Should Not Apply To Condemnation Cases.

The proposed amendments to Rule 68 present a special problem in the condemnation context. The amended Rule would allow either party to make an offer of settlement and if the final award were less favorable to the offeree than the offer, the offeree could be ordered to pay the offeror's costs and expenses. Two circuits follow the rule that the Government's recovery of costs against a condemnee would diminish the landowner's award of just compensation in violation of the Fifth Amendment. U.S. v. 101.80 Acres of Land, More or Less, in Idaho County, 716 F.2d 714, 728 fn. 26 (9th Cir. 1983); Grand River Dam Authority v. Jarvis, 124 F.2d 914 (10th Cir. 1942). If a landowner refuses a Rule 68 offer from the United States, and the ultimate award is in accord with the offer, but payment of costs and expenses to the United States is denied for Fifth Amendment reasons, the Rule would become a one-way street permitting its use by landowners but not the United States. Therefore, if proposed Rule 68 is to be adopted and made applicable to the United States, condemnation actions under Rule 71A should be exempt.

C. Merits Of A Rule Change Along The Lines Of Proposed Rule 68

For the foregoing reasons, the Department of Justice opposes development of this Rule 68 proposal through Judicial Conference rulemaking and opposes its application to the United States. Nonetheless, the Department fully shares the Advisory Committee's concern about the proliferation of costly and lengthy civil litigation. Frivolous lawsuits are brought all too frequently, burdening the courts and imposing unjustified litigation expenses. Various groups and organizations across the country have been wrestling with the problem of devising fair and effective alternative ways of resolving or settling disputes swifter and at a lesser cost to the parties than is possible under our present system. The Department of Justice strongly believes that the process of exploring such alternatives is of crucial importance to our judicial system.

We recognize that Rule 68 in its present form has not been an effective tool to encourage settlements. It applies to settlement offers made by defendants but not by plaintiffs. The only sanction is the award of court costs, which in general do

not include defendants' attorney's fees and in most instances are too small to be a significant factor in motivating settlements. Paradoxically, even that limited sanction becomes unavailable to the defendant if the plaintiff, after failing to accept a Rule 68 offer, loses the case entirely; the Supreme Court recently held that the sanction can be invoked only when the plaintiff prevails as to some part of his claim, but recovers less than the amount or value of the defendant's settlement offer. Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).

Accordingly, although the Department of Justice does not believe that the Judicial Conference rulemaking process is appropriate to a change of this magnitude, we recognize the reasons for the Committee's view that Rule 68 must be amended if it is to play a major role in deterring unnecessary litigation. We also recognize that a rule along the lines of the Committee's proposed Rule 68 offers potential benefits that should be considered, along with the risks and workability questions it may raise, if Congress decides to explore amendments to Rule 68 as an approach to the problem of burdensome litigation.

We agree with the Committee (page 11 of the Notes) that a rule along the lines of proposed Rule 68 could encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur, which should lead to more dispositions of cases before the heaviest expenses have been incurred. Litigants confronted with a settlement offer from an opponent during the early stages of a lawsuit may hesitate to commence serious negotiations for fear that any expression of willingness to pursue settlement will be perceived as a sign of weakness. While the amended Rule might not give litigants an incentive to make settlement offers any earlier in the course of litigation than under current practice, it would give them an incentive to give serious and immediate consideration to any offer that is made by an opponent, including offers made during the early stages of a lawsuit.

Additionally, a strengthening of Rule 68 could have the desirable effect of discouraging the maintenance of claims that have so little merit that the risk of having to pay the defendant's attorney's fees far outweighs the remote or speculative possibility of recovery, as well as discouraging the maintenance of frivolous defenses. Although the defendant could not invoke the sanctions of Rule 68 by making a "token" settlement offer, the defendant might be prepared in some cases to make a non-trivial settlement offer simply to avoid the much greater expense of defending claims it considers frivolous. A defendant confronted with an inflated claim could offer the fair value of the claim and later claim attorneys' fees if the plaintiff did not accept. In such instances, Rule 68 would constrain the plaintiff to accept the settlement offer rather than holding out for a more generous offer or proceeding to trial in order to avoid the

strong likelihood of having to pay the defendant's legal fees. Thus, defendants generally should be able to settle frivolous or inflated claims on financially more advantageous terms than they can at present. Similarly, defendants would be encouraged to accept reasonable settlement offers rather than interposing dubious defenses as a delaying tactic, at least in situations where no fee-shifting statute affords successful plaintiffs a right to attorneys' fees.

Even if the offeree rejects a Rule 68 settlement offer, such a rule may discourage dilatory tactics in the subsequent conduct of the lawsuit. If the offeree believes that there is a significant chance that it will have to pay an opponent's ... expenses and attorney's fees, it will have an incentive to limit the likely award by avoiding such tactics. And the offeror would have to take into account the discretion of the court to deny it an award of expenses due to dilatory tactics on its part.

Finally, plaintiffs would benefit from the recovery of pre-judgment interest against defendants, some of whom consciously refuse to settle until they reach the courthouse steps in order to retain the use of the funds. Such defendants might be less inclined to delay settlement negotiations because liability for interest would remove the economic advantage of delay.

Notwithstanding these potential benefits, we also see a number of potential drawbacks to a rule along the lines of proposed Rule 68. The most fundamental concern, in our view, is the risk that the proposed Rule would deter meritorious claims or defenses. A Rule 68 offer of settlement would be, in effect, an ultimatum from an adversary -- with consequences to the offeree that are potentially quite severe, but substantially unknown and unpredictable. The philosophy underlying the American Rule is that citizens should not be deterred by high litigation costs from asserting their rights. If many settlements were unfairly forced pursuant to Rule 68, the price to our judicial system would be high.

The litigation risks imposed by proposed Rule 68 might fall unevenly. With respect to parties of modest means who could be bankrupted by attorneys' fee awards that would have de minimis effects on wealthy opponents, the risk of loss is likely to affect the calculations of the financially weaker party to a substantially greater extent than it affects the calculations of his opponent. Personal injury litigation often represents such a situation, since the defendant is commonly safeguarded against the burden of litigation costs by insurance. In these types of cases, many plaintiffs are financially unable to obtain legal representation except on a contingent fee basis. Rejection of a Rule 68 settlement offer made by the defendant (or by the insurance carrier as the real party in interest) could threaten such a plaintiff with litigation expenses that he could not hope to satisfy. The litigant with greater financial resources may often retain higher-priced legal counsel than his opponent would choose

or could afford, thereby forcing a party with a meritorious case to accept the risk that the rejection of a Rule 68 settlement offer made by the wealthier party would lead to unacceptable litigation costs. In such circumstances, a party could be unfairly pressured to settle even a solidly-grounded suit or abandon a bona fide defense on terms advantageous to the opponent.

Moreover, evaluating litigation hazards is an extremely difficult task in any suit. Proposed Rule 68 would make this task even more difficult by requiring the offeree to predict as well how extensive the offeror's future expenses might be, including estimating the length of pre-trial, trial and even post-trial proceedings. Although the judge would have discretion not to award fees under proposed Rule 68, the offeree would have to make its decision well in advance of that determination by the court, and would have to rely on its prediction of that later ruling. The attorneys' fees in some types of cases can be enormous; and fees can multiply beyond all expectations where appeals result in new trials. We question whether offerors should be provided with such sizeable bludgeons. 5/

The use of Rule 68 by plaintiffs may present special problems. Plaintiffs, as initiators of litigation, already control its timing. A defendant who is not yet fully informed regarding the merits of the litigation could be placed in a difficult position by a settlement offer made very early in the proceedings. Under the proposal, a court should exercise its discretion to reduce the amount of the sanction if the defendant's refusal was reasonable at the time, but a defendant would have to rely on some future assessment by the court, made with the benefit of 20-20 hindsight.

In addition to these general concerns about the impact of proposed Rule 68, we also have questions about its workability and effectiveness. One such question is whether the proposed Rule, on balance, would have the intended results of more settlements and less extensive litigation. It appears that in certain situations the proposed Rule might decrease the likelihood of settlements. Absent a fee-shifting mechanism, parties must consider the cost of attorneys' fees along with the likelihood of recovering or paying damages in deciding whether to settle a case. The proposed Rule would offer each party the possibility

5/ Indeed, the two states whose procedures are cited with approval in the Advisory Committee Notes do not allow open-ended awards of attorneys' fees under the offer of judgment procedure. In Connecticut, the maximum award of attorneys' fees to either a plaintiff or a defendant is \$350. 52 Conn. Gen. Stat. §§52-192a(b) and 52-195(b). In New Jersey, the maximum amount is \$750. New Jersey Civil Practice Rules 4:58-2 and 4:58-3.

of having its fees paid by the other if they do not settle. Thus, if the parties to a suit were relatively optimistic about their prospects, the Rule might decrease the likelihood of settlement, since each party would be able to discount the legal fees it would be likely to have to pay if it did not settle. 6/

Moreover, a party who does not believe it will have to pay its own fees has a diminished incentive to minimize those fees. Thus, where the parties are relatively optimistic about their chances, they may incur greater expenses after the offer has been made than they would otherwise have incurred. Since the attorneys' fees as well as the damages requested will be at stake, they may be willing to invest more in litigation to assure victory. Accordingly, it is not clear that the effect, on balance, of the proposed Rule would be to discourage extended litigation.

Perhaps our most serious concern about the proposed Rule's effectiveness, however, relates to the discretion provided the court to reduce expense awards. We cannot disagree with the Committee's perception (page 11 of the Notes) of a need for judicial discretion "to avoid the Draconian impact of an 'all-or-nothing' rule." However, in our view this discretion, which according to the Note is broad but not "unbridled," creates a potential for increased litigation that would undercut the purposes of the Rule. These amendments might simply substitute attorneys' fee litigation for litigation on the merits.

Most obviously, the judicial discretion authorized under the Rule might generate considerable litigation at the district court level on the amount of an expense award. The questions presented would include: Was the judgment more or less favorable than the offer? In the common situation where settlement offers and counter-offers are made throughout a case, which offer or offers trigger the Rule? And from what date are expenses due? Were the expenses incurred from that date reasonable? Was it reasonable to reject the settlement offer? 7/ How burdensome would the award be? Less obvious, but equally troublesome, is the possibility of increased litigation by way of appeals. Beyond the existing excess of appeals on the merits,

6/ Conversely, as we have noted above, a relatively pessimistic party would have a greater incentive to settle because it would face the threat of paying its opponent's legal fees. Parties who are relatively pessimistic about their chances may be relatively likely to settle in any event, however.

7/ This question would create serious attorney-client privilege problems where a party rejects an offer on advice of counsel. And malpractice suits would surely result where such rejections are held unreasonable.

the appellate courts might be inundated by challenges to the discretion exercised (or not exercised) in cases where Rule 68 is invoked. Thus, a rule along the lines of proposed Rule 68 would create a serious dilemma. Judicial discretion regarding the expenses award seems essential, but the litigation and uncertainty caused thereby could undercut the purposes of the Rule.

An additional factor that should be considered by Congress before pursuing the approach embodied in proposed Rule 68 is the apparent conflict with existing federal fee-shifting laws, such as the Clayton Act or the civil rights laws, which entitle the prevailing plaintiff to reasonable attorneys' fees but withhold such relief from the prevailing defendant. In cases arising under such laws, which reflect congressional policy judgments relating to the burdens and societal benefits of private enforcement, the Rule would operate asymmetrically by providing the defendant with the opportunity to obtain attorneys' fees but extending no corresponding benefit to the plaintiff, who by statute is already entitled to attorneys' fees if he prevails in the lawsuit. One court has already opined that the proposed amendments

would significantly undermine the objectives of the fee-shifting provisions of the civil rights laws . . . Specifically, the policy underlying the cost-and-fee-shifting provision of Rule 68 (to encourage settlement) would conflict directly with the policy underlying the fee-shifting provisions of the civil rights laws (to encourage private plaintiffs to litigate civil rights violations).

Bitsouni v. Sheraton Hartford Corp., 33 FEP Cases 894, 901-2 (D. Conn. 1983).

In weighing whether amendments to Rule 68 are advisable, it should also be noted that recent amendments to other Federal Rules are now available to help promote settlements. Rule 16 has been amended to list settlement as a subject to be discussed at a pre-trial conference, a provision that will require timely consideration of possible settlements. Similarly, the early involvement of the court in supervising and prompting the discovery process, by such steps as issuing scheduling orders, should also increase the possibilities for settlement because adequate discovery generally is necessary before settlement options can be evaluated. At present, a much larger number of cases are settled than are tried and settlements generally are reached by a process of compromise, with the parties perceiving the final agreement as mutually advantageous. The Rule 16 innovations, although designed to produce an environment where profitable settlement negotiations will flourish, still preserve

the voluntariness of the settlement itself and thus avoid some of the concerns we have noted with respect to proposed Rule 68.

D. The Rule Should Not Apply To Equitable Relief.

Of particular concern to us is the effect proposed Rule 68 would have in cases involving equitable relief. 8/ First, the risk of unduly complicating and prolonging litigation is especially serious in such cases. The nature of equitable relief will often make a comparison of the relief offered with the relief obtained substantially more difficult than a comparison among judgments expressed in dollar amounts. Even if the court is able to conclude that the relief obtained is not more favorable to the offeree than the relief offered, the uncertainty surrounding such determinations is likely to affect as well the reasonableness of the refusal, further complicating that issue.

Second, the difficulty of predicting how the court will compare proposals for equitable relief imposes an even heavier burden on offerees than they would face in suits for money damages. Accordingly, there is an increased danger that application of the proposed Rule to offers of settlement involving equitable relief would deter the maintenance of meritorious claims or defenses, particularly where the resources of parties are unequal.

Finally, equitable actions are more likely to involve issues of public importance than are actions for damages. Forcing a party to choose between relief it considers insufficient and the threat of being required to pay substantial attorneys' fees to its opponent might seriously interfere with the vindication of important rights, to the detriment of society as a whole. Therefore, we believe that if proposed Rule 68 is

8/ Although we understand that the Committee did not have in mind settlement offers involving equitable relief, existing Rule 68 refers specifically to an offer of judgment "for the money or property or to the effect specified." At least one court apparently assumed that the rule applied to injunctive relief. See *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974). The proposed amendments would not eliminate the reference to judgments "to the effect specified." Moreover, the first sentence of the Note refers to a judgment "for a specified amount of money or property, or other relief."

adopted, it should be confined to offers of judgment for money or property. 9/

E. Technical Comments

1. The 30-day Period Is Too Short.

The proposed amendments to Rule 68 would provide that an offer shall remain open for 30 days unless a court authorizes earlier withdrawal. While the 30-day period is an improvement over the 10-day period in the present rule, we believe it is still insufficient and that an offer should remain open for 60 days. The Committee Note clearly contemplates that after an offer is made the offeror must permit the offeree to have access to discoverable information in order to evaluate the fairness of the offer. But many types of discovery (e.g., Rule 33 interrogatories and Rule 34 requests for production of documents) do not require a response for 30 days, unless the response time is shortened by order of the court. A 60-day period would at least allow for the possibility of the kind of discovery, and analysis of that discovery, contemplated under the proposed amendments.

Moreover, the Committee Note's statement that a reason for the extension is to give an offeree, such as the United States, the time to obtain the authority necessary to act on the offer would cause a problem because it may suggest to courts that 30 days (or whatever other period is provided) is sufficient, when in many cases involving the United States it is not. In some cases, the personal approval of the Deputy Attorney General is required. 28 C.F.R. §0.165. In others, the approval of an Assistant Attorney General is necessary. 28 C.F.R. §1.168 and Appendix to 28 C.F.R. Part O, Subpart Y. Any time a settlement is outside the delegated authority of the immediate litigation unit, with the result that approval at a higher level or levels would be needed, final action would normally take substantially longer than 30 days.

9/ Although there may be situations where it would be unfair to apply Rule 68 to a settlement offer involving money or property without taking into account injunctive relief requested in the same case, a district court could use the discretion afforded it under the Rule to avoid such inequities.

2. The Rule's Interaction With Rule 54(d) Should Be Clarified.

A prevailing party ordinarily recovers costs under Rule 54(d), although the court may exercise discretion to deny them. If the Rule 68 proposal is adopted in some form, we would also suggest that the Advisory Committee clarify in the Notes how Rule 68 is intended to interact with the costs provision of Rule 54(d).

In our view, when a party has prevailed but unreasonably rejected a Rule 68 offer of equal or better value, costs incurred after the date of the offer should be denied because they would not have been necessary if the offer had been accepted; prior costs could be allowed and offset against the amount owed by the offeree to the offeror under Rule 68.

In addition, proposed Rule 68 would provide that "[c]osts, expenses, and interest shall not be awarded to an offeror found by the court to have made an offer in bad faith." It is unclear whether the reference to "costs, expenses and interest" includes any and all costs, expenses or interest to which the offeror would be entitled under any of the Federal Rules of Civil Procedure in the event of a judgment in the offeror's favor, or is instead limited to the monetary sanctions provided for by Rule 68.

II. RULE 71A (CONDEMNATION OF PROPERTY)

We support the proposed amendments to Rule 71A(h). The amendments would remedy three problems that currently arise with the use of commissions in condemnation cases -- with respect to which our Land and Natural Resources Division has had considerable experience. The first problem arises when one of the commissioners, through death or disability during trial, becomes unable to hear the balance of the evidence. In most cases, a new commissioner has been appointed and the trial re-started. The proposal would permit alternate commissioners, just as alternate jurors are currently permitted. The second problem occurs when the judge appointing the commission asks the parties to suggest potential commissioners. This procedure usually results in a commission being more like an arbitration panel than an impartial factfinder. The proposal would require the judge to appoint the commission and alternates without consulting the parties. The final problem is that there has been no established procedure to inquire into the qualifications and biases of the commissioners. The proposal establish such a procedure. We support the entire Rule 71A proposal.

III. RULE 83 (DISTRICT COURT RULES)

We favor the proposed amendments to Rule 83 that would provide for a notice and comment period for local rules and give circuit judicial councils authority to abrogate rules which may be unreasonable or inconsistent with the Federal Rules of Civil Procedure. We also favor the requirement that proposed local rules be furnished to the Administrative Office of the United States Courts, which would make them available to the public. This should prevent a party being prejudiced by a local rule which is readily available only to a local counsel and court employees.

However, we oppose that part of the proposed Rule 83 amendments that would grant district courts authority to adopt, for up to a two-year period, experimental local rules which are inconsistent with the Federal Rules of Civil Procedure. These provisions of proposed Rule 83 would violate the precepts of the Federal Rules as well as Title 28 of the United States Code.

Rule 1 of the Federal Rules of Civil Procedure states that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." By permitting each district court to create rules inconsistent with the Federal Rules, amended Rule 83 would cause mass confusion and encourage forum-shopping. It would also contravene 28 U.S.C. 2071, which requires that the rules of the Supreme Court and all courts be consistent with the rules of practice and procedure prescribed by the Court. Thus, the Supreme Court cannot promulgate a rule that enables district court rules and practices to be inconsistent with other rules that it has promulgated.

Amended Rule 83 would also be inconsistent with 28 U.S.C. 2072, which states that "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals in the United States in civil actions. . . ." The broad aim of section 2072 was to create uniformity within the federal system. Monarch Ins. Co. v. Spach, 281 F.2d 401, 408 (5th Cir. 1960).

A further problem is that the litigation that would arise from passage of proposed Rule 83 would increase the confusion already resulting from its authorization of inconsistent local rules. Courts would have to determine whether these inconsistent rules so alter the litigation process as to affect the ultimate outcome of litigation and frustrate federal policies. Williams v. United States District Court, 658 F.2d 430, 435 (6th Cir.), cert. denied, 102 S.Ct. 980 (1981).

If it is decided that some rule experimentation is needed, we believe that it should be controlled by the Judicial Conference and instituted only in districts it selects: unless there is the authority (which the Judicial Conference would have)

to make a successful experimental rule permanent and universal, no valid purpose would be served.

IV. SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

A. General Opposition

We believe that the proposed revisions to admiralty rules B, C and E, except as noted below, would be ill-advised, both from the standpoint of admiralty practice and from the needs of the Justice Department enforcers of the Federal Pure Food and Drug and Consumer Laws, which laws often employ the admiralty practice. In both instances, swift action without the need for judicial intervention is often required.

In concept, these revisions are exactly backward. Current practice, with the sole exception of the need for immediate post-attachment hearings under Rule B, deprives no shipowner of due process. The revisions, however, would deprive lienors of due process in their only effective property right.

The maritime lien grew in a specific direction over centuries, to serve a specific purpose. The maritime lien has nothing in common with a land lien, much less the often doubtful security devices imposed by merchants. Among the many distinguishing features of the maritime lien are secrecy, non-consensuality, and inverse ranking, the last being senior. The lien law developed in this direction to accomplish the specific purpose of encouraging services to foreign and domestic commerce by water -- a most mobile, remote, and often elusive and anonymous, business.

The proposed revisions would defeat this purpose. The maritime lien gives the lienor a property right in the res itself, a form of co-ownership. Merchants Nat. Bank v. Dredge Gen. G. L. Gillespie, 663 F.2d 1228 (5th Cir. 1981). The enforcement of this right requires extreme diligence to find the res in order to sue. Not only are ship movements generally unpredictable and unadvertised, but port time in this age of container, bulk, and oil trade is exceedingly brief. To reward this diligence with the requirement that the lienor flush the quarry by pre-arrest or pre-attachment motion practice would effectively deny him the real opportunity to enforce his property rights in most cases. 10/

10/ In this particular connection, the Committee pays inadequate attention to Polar Shipping, Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982). This recent and
(Footnote Continued)

The proposed "exigent circumstances" safety-valve does not remove our concerns. Either exigent circumstances will routinely exist, in which case the revisions would be meaningless, or exigence would be so circumscribed as to deny due process to the lienor. Indeed, arrest is currently resorted to almost only in exigent circumstances; otherwise, security and arrest are stipulated.

The proposal does not make any distinction between Rules B and C, which it would revise alike. ^{11/} However, there is a significant distinction, which the cases on constitutionality recognize. True Rule C in rem jurisdiction is ancient and well understood both by lienors and shipowners. It views the ship herself as offender for tort lien purposes and the thing to which credit is extended for contract lien purposes. She carries jurisdiction to enforce these liens wherever she goes. Her owner thus knowingly accepts the risk of arrest along with all the other risks of sending a ship on a voyage. We can see no genuine due process implications in enforcing direct obligations by traditional in rem process.

We can also see nothing to be accomplished at a pre- or post-arrest hearing. Whether the lien is valid requires a trial, and is beyond the scope of a hearing. In the rare case of a truly egregious arrest, the defendant ship may make its motion. Otherwise, the rule which favors plaintiff's day in court should presume the regularity already vouched for by the verification. We question why revised Rule C should require a supporting affidavit. First, there is no Rule C antecedent describing the affidavit or what it should say. Second, it would be redundant. The complaint should state the facts, and the verification should attest to them. Together, they are an affidavit. The Munarço, 33 F.2d 329 (E.D.N.Y. 1929).

This is concededly not the case with Rule B quasi-in rem process. This is often misunderstood, and sometimes abused. Judicial attachment is a means of obtaining personal jurisdiction, through and to the extent of attached property. It is obviously preferable to unsecured personal jurisdiction, which

(Footnote Continued)

important case upholds Rule B's constitutionality, so long as there is guaranteed an immediate post-attachment hearing. See also Amstar Corp. v. S.S. Alexandros T, 664 F.2d 904 (4th Cir. 1981) (Rule C).

^{11/} Perhaps inadvertently, the certificate of exigent circumstances required of plaintiff by Rule B is missing from Rule C.

leads to the abuse of proceeding in districts where the goods are known to be, but the defendant is known not to be, or where the defendant is so remotely present that his goods are detained without cause but for a prejudicial period. The potential for due process abuse is always present, as well as expense to the garnishee, but so also is the abuse of removal of the goods in the event of a pre-attachment hearing.

As is plain from the case law, Rule B has given the courts, and the local rule-makers, considerable trouble. Because of the reciprocal potential for abuse of this rule, we think it advisable that either the rule, or the Committee Notes, provide for a practice similar to that employed in the analogous forum non conveniens cases. As is commonly known, the courts will conditionally transfer foreign seamen's injury actions to foreign tribunals, upon a showing that the seaman has effective relief there. In the foreign-attachment context, there is always the possibility that the defendant will be unable to respond in damages, or in some way protected by local law, with the result that the plaintiff will lose such security as the goods and chattels within the district court's jurisdiction. Accordingly, it would seem that at some point the defendant should be required to show that effective relief in a foreign tribunal will indeed be available to plaintiff.

We would therefore only revise Rule B, and Rule E as necessary to secure consistency, to provide a post-attachment hearing only, limited to the questions whether the defendant is within the district or within any other district not prejudicially inconvenient to the plaintiff -- with the burden of showing both on the plaintiff, but with an automatic order restraining any movement of the attached property pending the court's order. Any other matter would go so far into the merits as to exceed the scope of a mere hearing.

In sum, except for Rule B as noted above, the revisions seem ill-conceived, and without useful purpose. The only useful hearing would come after arrest or attachment, when an adversary could come forward to challenge the rare wrongful act. Arrest and attachment of course deprive defendants of property or its use. But the revisions weight the due process scales too heavily in favor of defendants, virtually presuming deprivation of due process, to the detriment of plaintiffs.

B. Civil Forfeiture Actions Should Be Exempted.

The proposed amendments would seriously damage the efforts of the Justice Department to use civil forfeitures in narcotics law enforcement. We believe that civil forfeiture actions are one of the most effective means of combatting large-scale drug trafficking organizations. Accordingly, if the

proposed amendments are to be adopted, we would urge there be an exception for civil forfeiture actions.

As the Committee Note explains, the amendments are intended to obviate challenges to the constitutionality of the Rules based on the due process principles enunciated in the Sniadach line of cases. However, these due process questions have arisen solely in the context of private admiralty suits. The Supreme Court has made it clear that the Government may seize property for forfeiture without affording a hearing to the owner of the property either before or promptly after the seizure. United States v. Eight Thousand Eight Hundred and Fifty Dollars, 103 S.Ct. 2005 (1983); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). Our concern is that the Note does not reflect any awareness that civil forfeiture actions are governed by the Supplemental Rules and that forfeiture actions do not raise the same constitutional issues as private admiralty suits. While the language of the Note suggests that the amendments are intended to address the problems that arise in private admiralty suits only, the amendments would, apparently inadvertently, impact on civil forfeitures as well.

The amendments would make the initiation of a civil forfeiture action subject to judicial review both before and promptly after the warrant of arrest issues. Presently, no judicial review is generally available until the trial on the merits of the forfeiture action. ^{12/} It especially concerns us that the amendment to Rule C(3) would require the Government to submit with the complaint an affidavit setting forth a prima facie case. Apart from the paperwork burden this imposes, it would reveal the Government's evidence to potential claimants who often are also defendants in parallel criminal prosecutions. At present, the Government can file a complaint and stay discovery until after the conclusion of a parallel criminal action.

^{12/} Proposed Rule E(4)(f) would give any person claiming an interest in the seized property the right to a prompt post-seizure hearing at which the plaintiff (i.e., the government) would have "the burden of showing why the seizure should not be vacated." At present, a claimant in a civil forfeiture case has no right to a hearing until the trial on the merits. A claimant can obtain a Rule 41(e) probable cause hearing only if the government delays filing the complaint or for the purpose of seeking suppression of evidence in the civil action. Where a Rule 41(e) motion based on delay is filed, the government typically responds by filing a complaint promptly and arguing that this action requires denial of the Rule 41(e) motion.

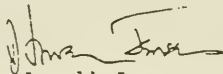
The proposed amendments would impose a needless, heavy burden on the Government and the courts. Two hearings rather than one would be required in every forfeiture case. The Rule E(4)(f) hearing would enable the claimant to discover the Government's evidence at an early stage of the proceeding before he himself is subject to normal civil discovery. He could then tailor his answers to Government discovery requests to meet the Government's evidence revealed at the Rule E(4)(f) hearing.

V. CONCLUSION

In summary, the Department of Justice opposes the Rule 68 proposal because it believes that any such rule change should be considered by Congress and that, in any event, it may not be made applicable to the United States; supports the Rule 71A proposal; supports most of the Rule 83 proposal, but opposes the district court experimentation authority; and opposes the Admiralty rules proposal, both in general and as applied to civil forfeiture actions.

We very much appreciate the opportunity to comment on these important proposals and would be pleased to submit any additional or clarifying comments that the Committee might request.

Sincerely,



D. Lowell Jensen
Acting Deputy Attorney General

BY HAND DELIVERY

June 5, 1985

The Honorable Robert W. Kastenmeier, Chairman
Subcommittee on Courts, Civil Liberties, and
the Administration of Justice
United States House of Representatives
Room 2137B, Rayburn House Office Building
Washington, D.C.

Re: "Rules Enabling Act of 1985" (H.R. 2633)

Dear Representative Kastenmeier:

We understand that the Subcommittee on Courts, Civil Liberties, and the Administration of Justice will soon hold hearings on a revised version of an earlier bill to amend the Rules Enabling Act. We represent law school teachers and persons in public interest law organizations who are concerned about problems in the judicial rulemaking system and specifically about the contents of this bill.

We would like to commend the Subcommittee for taking an interest in reforming the statutory delegation of rulemaking authority. We appreciate the Subcommittee's sustained interest in this important subject. Unfortunately, we do not believe that H.R. 2633, as currently drafted, addresses the most fundamental problems in the current structure of the rulemaking system.

Our concerns about the rulemaking process and about this draft of the bill stem from our experiences with the current structure. As you know, the Advisory Committees of the Judicial Conference currently have under consideration two very controversial proposals that would have the effect of limiting access to the federal courts. The first proposal, which would affect civil litigants, would amend Rule 68 of the Federal Rules of Civil Procedure by imposing substantial attorney's fee sanctions on parties who reject "reasonable" settlement offers. As you also know, many judges and commentators believe this change would work a substantive alteration, and would be in direct derogation of rights accorded under the Civil Rights Attorney Fees Awards Act of 1976 (42 U.S.C. §1988) and comparable fee-shifting statutes.

The second proposal pending is to amend Rule 9 of the Rules Governing Section 2254 and 2255 Proceedings in the United States District Courts. If adopted, this proposal would dramatically

expand the circumstances under which courts could refuse to entertain habeas corpus applications from prisoners. The proposal would permit dismissals, without decisions on the merits, in all cases in which the state or federal government can show it has been "prejudiced" (presumably in any way) by a "delay" (undefined in the proposed amendment) in the filing of an application for habeas corpus. The drafters of the rule apparently did not take sufficient cognizance of the fact that many prisoners who believe they have been unconstitutionally convicted must wait a substantial period of time to exhaust their opportunities for direct appeal and for state collateral remedies before filing habeas corpus applications.

Each of these proposals is of very doubtful merit, and both are highly inappropriate for judicial rulemaking. Each of the proposals was first advanced by an advisory committee in 1983, and each was severely criticized at hearings in early 1984. Nevertheless, each was re-published for further consideration in a revised form in 1984 -- and once again each has encountered substantial criticism at hearings held in early 1985. The Chief Justice has nevertheless continued, both publicly and privately, to urge the adoption of the two proposals. In fact, the proposal to amend Rule 9 was developed directly after the Chief Justice failed to persuade his colleagues on the Court to make a similar change in the law via case adjudication. Compare Aiken v. Spaulding, 684 F.2d 632 (9th Cir. 1982), cert. denied, 103 S. Ct. 1795 (1983) with 1983 Proposal and Advisory Committee Note (reprinted at 98 F.R.D. 337 (1983)) and 1984 Proposal and Advisory Committee Note (reprinted at 102 F.R.D. 407 (1984)). We have also learned that the Chief Justice has written directly to members of the Advisory Committee asking them to support the proposal for changes in the habeas rules.

As you and other members of the Subcommittee know, these recent developments do not represent the only time during which serious questions have been raised about the Supreme Court's exercise of its delegated rulemaking authority. The habeas corpus rules amendments that the Court forwarded in 1976 required Congressional hearings and revision (see Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15 (1977)), as did the proposed Federal Rules of Evidence (see Pub. L. No. 93-595 (1975)). There seems to be a continuing pressure at the Judicial Conference and the Court to expand "procedural" rulemaking into areas which involve or affect substantive rights, and we have found no signs of any institutional effort to curb this tendency.

Therefore, while we agree completely that reforms are needed in this process (and appreciate the Subcommittee's interest in making them), we believe that H.R. 2633 omits several of the most important, and most fundamental, reforms. One of the most basic problems with the current rulemaking process is that there is no adequate system of checks and balances to ensure that the Supreme Court and the committees of the Judicial Conference confine their rulemaking to the scope of the congressional delegation. The Supreme Court promulgates the rules, and the Supreme Court reviews them if they are challenged. This system contrasts sharply with other rulemaking processes. Rulemaking by executive branch or independent agencies can be "checked" by two other branches of government: by Congress if it is dissatisfied with the agency's exercise of its delegated authority and by an independent judiciary. Federal judicial rulemaking, however, is subject only to a limited Congressional check during the "layover" period (during which Congress must pass affirmative legislation and secure a presidential signature to delay or revise any rules proposal other than one affecting evidentiary privileges), and it is not controlled by any other branch or governmental entity. In fact, several justices of the Supreme Court have previously objected to their role in the promulgation of the rules on the grounds that they were required to precommit on issues that would later come before them for review. See, e.g., Order, 323 U.S. 821, 822 (1944) (memorandum of Justice Frankfurter). Commentators also have observed that because of this dual role in its decisions reviewing rulemaking the Court's objectivity has been compromised; the Court's opinions in Sibbach v. Wilson & Co., 312 U.S. 1 (1941) and Hanna v. Plummer, 380 U.S. 460 (1965) have been cited as examples of this problem. For these reasons, and in light of our recent experiences with Rule 68 and Rule 9, we do not think legislation such as H.R. 2633 which retains the Supreme Court in its present rulemaking role will produce effective and meaningful reform in this process.

In addition to our general concern about the statute, we have the following specific comments about points contained within or pertinent to H.R. 2633:

1. We commend the fact that H.R. 2633 does not provide the rulemakers with authority to "supercede" statutes. As you know, we believe it is appropriate, both historically and legally, that this supercession or "trumping" authority, contained in the 1934 Act, not be reenacted.

2. We also applaud the provisions of section 2073(d) which require the rulemaking body making a recommendation to provide a

written report (including any minority or separate views) as well as an explanatory note on any proposed rules. This change represents a useful step forward. Since the "gap reports" that are currently written are not publicly available (see Rules Enabling Act: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st and 2nd Sess. 31 (1983 & 1984) [hereinafter cited as Hearings]), it is important for the commentary accompanying this section of the bill to make clear your intent to have these reports publicly maintained and available.

3. H.R. 2633 continues the present practice of allowing the Chief Justice to appoint all of the members of the advisory committees and the Standing Committee. Your earlier bill, H.R. 4144, would have provided for the Judicial Conference, not the Chief Justice, to make these appointments. In this and several other respects, the earlier bill made the types of improvements that many commentators had urged. Recent history, and in particular the developments with respect to the proposed amendment to Rule 9 in the habeas corpus area, furnishes illustration of the need to redistribute responsibility for various aspects of the rulemaking structure and process.

4. H.R. 2633 continues the present practice of not limiting the length or the number of terms served by members of the Advisory Committees or the Standing Committee. In this respect, your earlier bill (H.R. 4144) which would have limited the terms of service was far better.

5. Section 2072(c)(1) of the bill, which provides for more open meetings, is problematic insofar as: (a) it allows for the closing of a meeting simply upon a determination by committee members (who have testified that they much prefer deliberating in private, see Hearings at 11, 18-19, 91, 100-102) that it is "in the public interest" to close meetings, and (b) the "legislative history" to date on this provision of the bill (contained in the section-by-section analysis of H.R. 6344) is very ambiguous (see Hearings at 174-76). As you know, the Sunshine in Government Act provisions under which many other agencies operate contain far more exacting openness requirements. At a minimum, we urge that provisions be included in this legislation requiring the committee members to give specific reasons for voting to close meetings to the public, and that the legislation include a presumption in favor of open meetings.

6. We also suggest that, to assure informed congressional consideration during the "layover" period, the full minutes of any

meetings that are closed by committee vote be maintained and made available to the House and Senate Judiciary Committees when the pertinent rules proposals are forwarded.

7. H.R. 4144 contained a nine-month congressional layover period. This was a distinct improvement over the current periods, which are too short. Unfortunately, H.R. 2633 shortens the time to seven months.

8. We are opposed to the inclusion of the sentence in Section 2074(a) of the bill which allows the Supreme Court to "fix the extent [to which] such [newly promulgated] rule[s] shall apply to proceedings then pending." There will be circumstances in which it would be particularly unfair to apply newly developed rules to litigants in pending cases (who had proceeded in reliance upon the earlier set of rules). For a number of years the rulemakers have included provisions in Federal Rule of Civil Procedure 86 (or in the orders accompanying the rules) instructing that once rules take effect:

They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.
(Emphasis supplied.)

Unless and until this type of provision is shown to be inadequate, it is unnecessary and may be counterproductive to assign the Supreme Court the task of determining, in advance, to what extent each newly promulgated rule shall apply to a pending proceeding.

9. Section 2074(a) of the bill should make explicit that if amendments to a statute are necessary to implement a proposed rule, the rule will not take effect unless Congress affirmatively enacts those amendments.

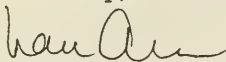
10. Section 3 of the bill, which provides for the Judicial Conference to periodically review local rules, should include a minimum time period for that review, such as every two years.

11. Commentators have repeatedly criticized the fact that neither the Supreme Court nor any of the Judicial Conference committees has developed a set of guidelines delineating what they

believe to be the scope of their authority to promulgate procedural (but not substantive) rules. See Burbank, The Rules Enabling Act, 130 U. Penn. L. Rev. 1015, 1194-97 (1982). The bill should include a specific requirement that the Judicial Conference develop such a set of internal controls, and furnish a copy to Congress.

Thank you for the opportunity to comment on this legislation. Again, we wish to commend the Subcommittee for its sustained interest in this matter, and to urge continued oversight and revision. Please do not hesitate to contact us if you have any questions. We would appreciate being kept apprised of revisions in the bill.

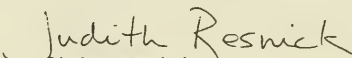
Sincerely,



Nan Aron
Alliance for Justice



Laura Macklin
Institute for Public Representation



Judith Resnick
Dennis E. Curtis
William Genego
University of Southern California
Law School

LM/ntl

Copies: Subcommittee Members

Alliance for Justice

A National Association of Organizations Working for Equal Justice

NAN ARON
Executive Director

WILLIAM L. TAYLOR
Chair

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Women's Law Project

Women's Legal Defense Fund

BY HAND

April 1, 1985

Joseph F. Spaniol, Jr.
Secretary
Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposal to Amend Rule 68
of the Federal Rules of
Civil Procedure

Dear Mr. Spaniol:

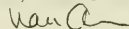
Enclosed please find sixteen copies of additional comments by the Alliance for Justice on the current proposal to amend Rule 68 of the Federal Rules of Civil Procedure.

We appreciate the opportunity to forward these additional views on the Advisory Committee's proposal to amend the rule.

Please do not hesitate to contact me, or Laura Macklin at the Institute for Public Representation, if you or members of the committee have any questions.

Thank you.

Sincerely,



Nan Aron
Director

Enclosure

Telephone (202) 624-8390

Mailing address 600 New Jersey Avenue N.W. Washington D.C. 20001

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Alliance Justice for

A National Association of Organizations Working for Equal Justice

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Sierra Club Legal
Defense Fund

Women's Law Project

Women's Legal Defense Fund

BEFORE THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON THE FEDERAL RULES OF CIVIL PROCEDURE

COMMENTS OF THE ALLIANCE FOR JUSTICE ON 1984 PROPOSED AMENDMENTS TO RULE 68

Submitted on behalf of the
Alliance for Justice by:

Ann O'Bryan
Student Intern
Charlotte B. Rutherford
Graduate Fellow & Staff Attorney
Laura Macklin
Assistant Professor & Assoc. Director
Institute for Public Representation
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April 1, 1985

INTRODUCTION

The following comments on the proposed amendments to Rule 68 of the Federal Rules of Civil Procedure are submitted on behalf of the Alliance for Justice, a national non-profit association of public interest law organizations. A representative of the Alliance for Justice testified at the Advisory Committee's February 1, 1985 hearing on the proposed amendments to the rule, and submitted written testimony at that time.¹ These comments will explore issues which warrant detailed consideration and were not covered in the Alliance's earlier testimony. As the first section of these comments explains, a detailed examination of how a Rule 68 proceeding under the proposed amendment might work reveals significant weaknesses and numerous unresolved questions in the proposal. At a minimum, these problems appear to render the proposed rule ineffective as a tool for achieving the goals stated by the Advisory Committee. The second section examines one problem in particular that will result from the adoption of the

1 In its testimony, the Alliance for Justice explained, inter alia, that: 1) the need for the proposed amendments has not been demonstrated by the Advisory Committee; 2) the proposal will work in derogation of plaintiffs' rights under numerous fee-shifting statutes; and 3) there is a serious question as to the Supreme Court's authority to promulgate the proposed amendments. See Testimony of the Alliance for Justice on the 1984 Proposal to Amend Rule 68 (Jan. 28, 1985).

proposed rule: the attorney-client relationship will be threatened. Finally, the third section discusses the fact that many of the problems perceived by members of the Advisory Committee can already be solved by existing rules governing litigation and their accompanying sanctions provisions. Further, the existing rules contain more appropriate standards of conduct than the proposed Rule 68. For the reasons detailed herein, as well as those enumerated in earlier testimony, the Alliance for Justice opposes the proposed 1984 amendments to Rule 68.

I. An Examination of a Proceeding Under the Proposed Rule Reveals Serious Problems.

A number of questions about the mechanics of a Rule 68 proceeding remain unanswered by the proposal. Neither the text of the proposed rule nor the Advisory Committee Note details the way in which a Rule 68 proceeding would occur. This is disturbing. The mechanics of the proceeding will have a substantial effect on the amount of time, money, and judicial resources devoted to implementing the rule. Moreover, many of the proposal's weaknesses are revealed by a detailed inquiry into how the proposed rule would work.

Only a brief outline of a Rule 68 proceeding is available from the text of the proposal. According to the text, once the offeror has alleged that an offer was unreasonably rejected, the court must make a determination of the reasonableness of the

offer. In order to make that determination, the court must consider all of the relevant circumstances at the time of the rejection, including:

- 1) the then apparent merit or lack of merit in the claim that was the subject of the offer,
- 2) the closeness of the questions of law and fact at issue,
- 3) whether the offeror had unreasonably refused to furnish the information necessary to evaluate the reasonableness of the offer,
- 4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties,
- 5) the relief that might reasonably have been expected if the claimant should prevail, and
- 6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

The offeree can defend against the motion on the ground that the offer was a sham or made in bad faith, according to the Advisory Committee Note. Further, if the offeree has made a counteroffer, the court will be required to make an additional, similar set of findings about that counteroffer.

The text of the proposal and the accompanying Committee Note lack a description of how the court should make these findings, when, and against whom. Without such instruction, courts may have a great deal of trouble attempting to enforce the rule, and parties may not be able to understand how to comply. The confusion that may develop from the incompleteness of the rule

could add significantly to the inefficiency and expense of litigation because both the courts and litigants would be unsure about how to proceed. One result of such difficulties is that the rule may be rendered ineffective in achieving its goal of early settlement. It is also possible that the rule will be interpreted in ways that are unfair to some litigants and not uniform throughout the judicial system.

A. The Scope of Factual Proof in a Rule 68 Proceeding Would Be Broader Than at Trial, Resulting in More Expensive and Time-Consuming Litigation.

The scope of the factual proof relevant in a Rule 68 proceeding under the proposed rule would be significantly broader than the scope of discovery and proof on the merits. For example, the trial court will have to determine what facts were known to the offeree at the time of the rejection in order to make a finding on the first factor ("the then apparent merit of the claim"). This requirement of new factual findings will result in the additional consumption of judicial and litigant time and resources, which is contrary to the stated goals of the proposed rule. Even without a clear indication of the form a Rule 68 proceeding will take, it seems evident that the proposed rule will add yet another step to the process of litigation.

The question of exactly how much time a Rule 68 proceeding will consume, however, remains unanswered because the proposal

gives no indication of how and in what form the court should make its findings. For example, the question of whether the parties will be accorded a full hearing on the sanctions issues remains open.² Additionally, there are questions of whether the court will have to make specific findings on each of the factors, and whether the court will have to issue a written decision on its findings. If any or all of these questions are answered in the affirmative, the Rule 68 proceeding will become more complex and the burden on litigants and courts will be increased. However, these kinds of requirements are not merely technical, they help to ensure that the rights of the parties will be protected.

B. The Timing of a Rule 68 Proceeding Is a Critical Yet Unanswered Question.

The timing of a Rule 68 proceeding will also be important, and yet again, the proposed rule and accompanying Note describe the timing of the proceeding only briefly, by stating that the offeror's motion must be made within ten days of the entry of judgment. Although this appears to imply a post-trial proceeding,

² Compare the procedural steps Congress intended courts to follow in sanctioning pursuant to 28 U.S.C. § 1927. H.R. Rep. No. 1234, 96th Cong., 2d Sess. 8 (Conference Report), reprinted in 1980 U.S. Code Cong. & Ad. News 2781, 2783 (attorney must be accorded a full hearing and due process before sanctions may be imposed). See Barnd v. Tacoma, 664 F.2d 1339 (9th Cir. 1982). For a discussion of 28 U.S.C. § 1927, see infra, p. 23-26.

the language of the rule does not foreclose a pre-trial proceeding. Hence, it is not clear whether the Advisory Committee intends the motion and proceeding to be pre- or post-trial. According to the proposal, the court's finding on the reasonableness question requires only an examination of the facts known at the time of the offer. The court will not use other facts, including the outcome of the trial, to make a finding on reasonableness. Thus, the requirements of the draft rule and Committee Note neither preclude a pre-trial ruling nor require one post-trial. There are a number of arguments for and against either pre- or post-trial rulings. However, in both cases the arguments reveal numerous problems with the proposed rule.

One difficulty with a post-trial ruling is that the time lapse will bring about problems of recollection and discovery that will make it harder for the court to determine the "unreasonableness" of the rejection at the time it occurred. In addition, judges may well change their views of a case during the course of the litigation. The facts of Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983), cert. granted, 104 S. Ct. 2149 (1984),³ clearly reveal the influence that the outcome of a case can have on a judge's post-trial ruling.

Another example of the influence that the outcome of the

³ The facts of Chesny are set out in the written testimony submitted by the Alliance for Justice (Jan. 28, 1985), at 37-39.

trial may have on a Rule 68 proceeding is the extreme unlikelihood that an offeror will make a Rule 68 motion if the offeree is awarded more at trial than the settlement offer. However, a strict reading of the Committee Note indicates that an offeree may be sanctioned under Rule 68 even when he or she is awarded more at trial than the opposing side offered. For example, it may be possible for a plaintiff, based on the facts known to him or her at the time of the offer, to unreasonably refuse a settlement offer, but because of facts later discovered, to be awarded more at trial than he or she reasonably had expected to receive. If the outcome of the trial is disregarded and only the facts known at the time of the Rule 68 offer are examined, such a winning plaintiff may be sanctioned under the proposed rule.

On the other hand, if the outcome of the trial is used as evidence in a finding of unreasonableness, there may be substantial unfairness to the refusing party. That party must take a chance not only that his or her refusal will be found to be unreasonable, but also that one of the significant factors upholding that finding will be something altogether unknowable to the refusing party, i.e., whether or not he or she will prevail at trial.

In both situations, there may be some unfairness to the offeree. In the former, it seems unfair that a plaintiff who is rightfully awarded more at trial than he or she was offered in settlement should then be forced to pay the losing defendant's

attorney's fees and costs. Moreover, this result is contrary to the stated intention of the proposal to apply only to claimants who recover no more at trial than was offered. Despite the fact that the outcome of a case may indeed be evidence of the reasonableness of a refusal, it is not evidence that can or should be used in a proposed Rule 68 determination because of that potential unfairness. Nevertheless, it is nearly impossible to believe that, in fact, the outcome and award (if any) will not be a weighty piece of evidence. Yet, this latter situation may present hardship to any offeree who even contemplates refusing an offer; he or she would be taking a large financial risk.

As noted above, a pre-trial ruling may also be possible. Such a ruling, made shortly after the offer is rejected, has the obvious advantage of an immediate determination of sanctionable behavior. However, in answering a motion based on a rejected Rule 68 offer, the offeree would have to present evidence to justify his or her refusal. Thus, the offeree would be forced to reveal confidential work product, including his or her attorney's assessment of the strengths and weaknesses of the case, pre-trial strategy, and all of the key facts known to him or her. In other words, all of the attorney's work and knowledge of the case would simply be given to the opposing counsel, which is contrary to the policies that protect against the disclosure of confidential work

product.⁴

A pre-trial ruling would also require the judge to hold a mini-trial on all of the factors contained in the draft rule and Note. Such a mini-trial would add yet another step to the litigation, and further tax judicial resources. Moreover, there is a substantial margin for error in a pre-trial ruling.

Finally, the question of the consequences of a pre-trial ruling remains unanswered. For example, if the court were to find a refusal to be unreasonable, would the suit be dismissed? Or, would the offeree be forced to accept the offer? Or, would the parties still go to trial? Even if the parties can still go forward to trial, what would be the effect on a losing offeree who knows that regardless of the outcome on the merits, he will have to pay the opposing party's costs including attorney's fees? As these questions reveal, a pre-trial ruling may have a strongly coercive effect.

Regardless of whether the Advisory Committee envisioned a pre- or post-trial ruling, the fact that either may be allowed according to the text of the proposal remains a problem. Different courts may vary in their interpretation of the rule, and this may have an impact on the rights of the parties involved in a Rule 68 proceeding. If different courts were to decide in favor

⁴ The problem of disclosure of work product material is discussed *infra*, pp. 15-20.

of each option, similarly situated parties might receive substantially different treatment. Because of the potential for unfairness that would result from such an occurrence, this proposal should not be enacted.

C. Whether a Rule 68 Sanction May Be Imposed on the Offeree's Attorney Remains a Question.

The Advisory Committee's draft also leaves open the issue of how a sanction will be imposed, and on whom. When an offeree has rejected a settlement offer and claims that the rejection was based on his attorney's advice, it is not clear: whether the attorney can be brought into the Rule 68 proceeding as a co-defendant or third party; or, whether the offeree must then sue the attorney in a separate proceeding, such as a malpractice suit, claiming his or her advice was so irresponsible as to constitute malpractice.

If one reads the text of the proposed rule literally, the sanction may be imposed only on the offeree because only the offeree, and not the attorney, is named in the rule.⁵ However, there is a potential that parties in some cases may be hurt if the rule is read as exempting the attorney from liability in a Rule 68 proceeding. Take, for example, the case of a client involved in

⁵ Other Federal Rules of Civil Procedure that authorize sanctions specifically name who is liable. See, e.g., Rules 11, 26(g), and 37(b) (sanctions may be imposed on party, his attorney, or both).

litigation who knows little or nothing about the legal process and, relying on the advice of his or her attorney, has refused a settlement offer. The client's refusal is subsequently found to be unreasonable in a Rule 68 proceeding, and costs and attorney's fees are assessed against the client. This party, believing that his or her attorney's advice was bad, brings a malpractice suit against his or her attorney only to discover that the standard for attorney liability in malpractice cases is more stringent than mere unreasonableness.⁶ Hence, this litigant, caught between the strict standards for finding malpractice and the more lenient standard of unreasonableness, may be unable to recover any part of the fees assessed against him or her as a result of his or her reliance on the attorney's advice.

There are also a number of difficulties in allowing the court to impose sanctions directly on the attorney in a Rule 68 proceeding. One of the problems is that the basis for imposing sanctions on an attorney who has not engaged in prohibited conduct is unclear. Since the rule does not name the attorney, a basis for imposing sanctions on him or her must be sought elsewhere.

⁶ A lawyer is required to act with the level of skill and learning commonly possessed by members of the profession in good standing. If harm results, the lawyer will be liable for malpractice if he or she does not possess or has failed to use that level of skill and learning. However, the lawyer does not warrant or insure the outcome, and is not liable for a mere honest error of judgment where the proper course is open to reasonable doubt. Prosser, Handbook of the Law of Torts 162 (West 4th ed. 1971).

The attorney has not necessarily, for example, signed a pleading in bad faith (Rule 11), refused to follow a court order to produce discovery (Rule 37), unreasonably and vexatiously multiplied the proceeding (28 U.S.C. § 1927), or acted in bad faith. Nor has he met the judicial standards for assessing attorney's fees directly against counsel: willful abuse of the judicial process. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980). The attorney, therefore, has neither violated an objective requirement similar to those contained in other Federal Rules of Civil Procedure, nor has he violated the more general standards for litigation conduct (e.g. bad faith and Section 1927).

The shortcomings of the proposed Rule 68 lie not only in the fact that the mechanics of applying the rule have not been defined, but more importantly, in the fact that serious difficulties become apparent when the mechanics are considered. The presence of these unanswered problems is one of the many reasons why the Alliance for Justice cannot support the proposed rule.

II. The Proposed Rule Will Have a Destructive Effect on the Attorney-Client Relationship.

The proposal, if enacted, will have a destructive effect on the attorney-client relationship. The rule will hamper the free communication between clients and attorneys which is the very foundation of the relationship. Without such communication and trust, no attorney can effectively serve his or her clients, and injustice may result.

A. The Proposed Rule Will Cause Conflict Between the Interests of Parties and Their Attorneys.

The proposed rule will deter lawyers from representing parties in litigation, particularly from representing less affluent clients or parties in public interest litigation. Even if the lawyer accepts such cases, it will virtually always be in the best interests of the lawyer to advise settlement because many clients will not be in a financial position to refuse a settlement offer if that refusal might be perceived by a court as unreasonable. Further, it may be in the best interests of the lawyer to advise settlement because the lawyer may prefer not to risk personal liability for sanctions, or other possibilities of conflict with his or her client.⁷

⁷ As discussed supra, pp. 10-12, the standards, if any, for finding a lawyer personally liable for a Rule 68 sanction are not clear from the words of the proposed rule. If the rule were
(Footnote continued)

Both the attorney and client have an interest in avoiding the imposition of Rule 68 sanctions. However, the interests of the lawyer, who may advise settlement in order to avoid the possibility of personal liability for unreasonableness along with his client, may in other respects conflict with the interests of the client. The attorney may be so unwilling to risk potential personal liability that he or she may always advise settlement in response to a Rule 68 offer, rather than weighing whether settlement is in the client's best interests. These divergent interests will not only create tension between the attorney and client, they may also prevent the client from receiving adequate representation and advice.

Moreover, this type of conflict of interest in an attorney-client relationship presents potential problems of professional responsibility for the attorney. The Model Rules of Professional Conduct require an attorney to advise his client free from his (the attorney's) own self-interest. Model Rules of Professional Conduct, Rule 1.8. The attorney is directed to advise the client "candidly" (Rule 2.1) and the attorney may "discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good

7(continued)

adopted, however, it is almost certain that once parties are held liable for monetary sanctions under Rule 68, those parties and their attorneys will be in conflict about whether, or in what ratio, each will be liable.

faith effort to determine the validity, scope, bearing, or application of the law" (Rule 1.2(d)). The attorney is not precluded from giving a professional opinion as to what he or she believes would likely be the ultimate decision of the court. Rule 1.2 Comment. However, Rule 1.2(a) allocates decision making on the issue of settlement to the client.

Although the client may have to make the decision about whether or not to accept a settlement offer, that decision may often be based primarily on the advice the client has received from the lawyer. The manner in which the lawyer chooses to present his or her discussion on the settlement issue to the client may determine how the client perceives his or her chances, and thus may also determine the client's decision.

As noted above, the imposition of proposed Rule 68 will place an intense pressure on the lawyer to advise settlement because his or her advice to the client may come under judicial scrutiny if and when a subsequent determination of unreasonableness is made. Because of the potential influence some attorneys may have over the decisions of their clients, attorneys who are unwilling to risk personal liability and potential diminution of professional reputation may be unable to advise clients free from self-interest. The obvious result will be inadequate representation of clients whose legal rights are affected.

B. The Proposed Rule Will Require the Disclosure of Confidential Work Product Material.

Proposed Rule 68 will have a tremendous negative impact on the relationship between attorneys and clients. That the rule will seriously disturb the attorney-client privilege has been sufficiently described elsewhere,⁸ and we will not reexamine that subject here. However, we will explain in the following pages why we believe the adoption of the proposed Rule would further weaken the attorney-client relationship by requiring the disclosure of confidential work product material.

Litigation on the issue of reasonableness will be inevitable and vigorously contested because of the considerable financial incentives. In many cases both parties will make motions under Rule 68 because the proposal allows sanctions for the unreasonable refusal of both offers and counteroffers. The court will then have to make a separate determination of unreasonableness on each offer's rejection because the standard requires the judge to consider the relevant circumstances at the time of each offer or counteroffer. Accordingly, the court will not be able to mechanically wash out the competing Rule 68 motions but will have to make full and separate findings on each.

This collateral litigation on the issue of unreasonableness

⁸ See, e.g., Association of the Bar of the City of New York, Comments on Proposed 1984 Amendment to Rule 68 (Jan. 21, 1985) at 5-8.

may well involve detailed disclosure of confidential work product materials because the determination of unreasonableness will depend on how and why the client made the decision to refuse the offer. Since that decision is not based on a simple mathematical addition of the facts, a mere examination by the judge of the facts known to the attorney and client will not automatically reveal whether the decision was reasonable.

Rather, a judicial inquiry into this decision not to settle will require the disclosure of confidential work product (i.e., the attorney's opinion on the strong and weak points of the case, his or her strategies for trial, and opinion on the worth of the case) because this is the best available evidence. However, an examination of the private discussions and decisions that are made in the confidentiality of the attorney's office defeats the purpose served by the work product rule. Further, lawyers should not be placed in the untenable position of knowing that the rejection of a settlement offer may result in a situation where they have to give up the confidentiality of their work product in order to defend against allegations of unreasonableness.

Therefore, in considering the impact of the Rule 68 proposal, it is important to review the history and scope of the work product doctrine. As members of the Advisory Committee know, confidential work product was well defined in Hickman v. Taylor, 329 U.S. 495 (1947). The Supreme Court stated:

In performing his various duties, however, it is essential that a lawyer work with a certain

degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of our jurisprudence to promote justice and their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 510-11. If the proposed Rule 68 were adopted, it is likely that many of the Supreme Court's concerns would be realized. In any proposed Rule 68 proceeding, because of the difficulties of determining what relief a claimant could have reasonably expected at the time the offer was rejected, contemporaneous analysis of the situation would be given the greatest weight. But that contemporaneous analysis would rely heavily on confidential work product, the disclosure of which would create all of the problems enumerated in Hickman.

The confidentiality of work product is qualified, not absolute. United States v. Nobles, 422 U.S. 225 (1975) (protection of work product limited to only pre-trial discovery; protection can be waived). Further, Hickman was codified by Federal Rule of Civil Procedure 26(b)(3), governing general discovery provisions. That rule permits the discovery of work product material where there is a showing of substantial need and the unavailability of materials through alternative means without undue hardship. Under these Rule 26(b)(3) provisions, it seems likely that in a Rule 68 proceeding the offeror would be able to obtain production of the work product of the offeree's attorney; hence, the concerns voiced by the Supreme Court in Hickman are likely to be realized. Attorneys would, for example, be wary of creating and keeping written records assessing strengths and weaknesses in their case and evaluating settlement offers because of the potential discoverability of such documents in a subsequent Rule 68 proceeding. ⁹

9 The issue of whether confidential work product is discoverable in a later case or proceeding has been the subject of a number of decisions. Commentary on the issue states:

Some decisions seem to stand for the proposition that the work product immunity applies only to documents prepared in direct relation to the case at bar and that documents prepared for one case, though they would be protected in that case, are freely discoverable in a different case. The sounder view appears to be that of other decisions in which it is held that documents prepared for
(Footnote continued)

Hence, Proposed Rule 68 may be an obstacle to a lawyer's detailed communication with his or her client. Parties involved in complex and important litigation and settlement negotiations deserve the best advice and representation possible from their lawyers. If a lawyer's ability to provide that representation is hampered, clients will not get zealous and effective representation.

III. Provisions to Regulate the Conduct of Litigation Which Already Exist Obviate Any Need for the Proposed Amendments to Rule 68.

The Alliance for Justice submits that to the extent that there is a need to sanction parties and attorneys who abuse or

9 (continued)

one case have the same protection in a second case, at least if the two cases are closely related.

C. Wright & A. Miller, Federal Practice and Procedure, § 2024 (1970) at 200-01. A few cases hold that work product is never discoverable, even at a later date. See, e.g., Duplan Corp. v. Moulinage et Retordie de Charanoz, 509 F.2d 730 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975). In that case, the court interpreted the language of Rule 26(b)(3), "the court shall protect against disclosure [of confidential work product]" to mean that no showing of relevance, substantial need, or hardship will justify disclosure, reasoning that if disclosure were allowed our adversary system would suffer. Id. at 734-735. Thus it is not even clear whether the work product of the offeree's attorney would be discoverable in a Rule 68 proceeding. And yet, that evidence, because it would be contemporaneous, would undoubtedly be the best evidence available to prove the reasonableness of a refusal.

interfere with the judicial process, such sanctions already exist and are already being used by the courts. Further, these sanctions are available to punish both specific abuses of process during civil litigation, as well as general violations of good faith and other duties owed by parties and their attorneys during the litigative process. All of the other sanctioning rules, however, have standards of culpability that are aimed at more egregious conduct than the unreasonableness standard of the proposed Rule 68. Furthermore, those that address abuses of one aspect of the civil litigation process, as the proposal does, are based on objective standards rather than the type of subjective standard in this proposal.¹⁰ As the NAACP Legal Defense Fund pointed out in its testimony, the settlement process is not amenable to control by sanctions because it is a subjective rather than objective process.¹¹ In this section, some of the other sanctions available under existing rules will be examined, and they will be compared with the proposal to amend Rule 68.

10 The terms "subjective" and "objective" are used here not as legal terms of art, but rather according to their common usage. Objective is defined as "having actual existence or reality; uninfluenced by emotion, surmise, or personal prejudice." Subjective is defined as "proceeding from or taking place within an individual's mind such as to be unaffected by the external world; particular to a given individual; personal." American Heritage Dictionary, American Heritage Publishing Co., Inc. and Houghton Mifflin Co. (1969).

11 NAACP Legal Defense and Educational Fund, Inc., Comments Regarding Proposed Amendments to Rule 68 of the Federal Rules of Civil Procedure (Jan. 29, 1985) at 9-15.

Sanctions for Bad Faith Conduct

Although the traditional American rule ordinarily disallows awarding attorney's fees as a sanction unless there is a statutory authorization, federal courts may impose sanctions, including costs and attorney's fees, in exceptional circumstances. In cases where a party has litigated in bad faith, a award of attorney's fees is generally permitted under a long established exception to the American rule. See generally Hall v. Cole, 412 U.S. 1, 4-5 (1973). The bad faith exception allows the court to impose attorney's fees on the non-prevailing party when he has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 J. Moore, Moore's Federal Practice, § 54.77 at 1709 (2d ed. 1972). This sanction may be imposed against both parties and counsel. Nevertheless, "[t]hat rule must be applied with caution to make sure that plaintiffs are not deterred from suing to enforce their rights.... At the same time, the rule must be applied in appropriate cases to spare members of the public from the expense of defending against baseless allegations." Nemeroff v. Abelson, 704 F.2d 652, 654 (2d Cir. 1983). Thus, the strict and well-known standard which requires a showing of bad faith must be met before a court may sanction parties with the imposition of costs and attorney's fees. Since this may be done at any stage of the litigation, if a party were to refuse a settlement offer in bad

faith, he or she may be sanctioned by a court according to this rule.

28 U.S.C. Section 1927

Furthermore, courts are authorized to hold counsel personally liable for sanctions consisting of excessive costs and fees under 28 U.S.C. § 1927. Section 1927 states, "any attorney who multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Although the language of the rule contains no requirement of bad faith, the legislative history of the recent amendments to § 1927 makes it clear that Congress intended the standard for triggering sanctions to remain quite high.¹² Congress based its determination to retain the bad faith standard on its concern that a lower standard might "dampen the legitimate zeal of an attorney in representing his client."¹³ These concerns may apply equally to the Rule 68 proposal. The proposal's lower standard of

¹² In 1980, Section 1927 was amended to include attorney's fees in the category of excess costs. For the Congressional discussion of retaining a high standard see H.R. Rep. No. 1234, 96th Cong., 2d Sess. 8 (Conference Report), reprinted in 1980 U.S. Code Cong. & Ad. News 2781, 2782 [hereinafter cited as Conference Report].

¹³ Conference Report, supra n.12 at 8.

unreasonableness is so broad that an attorney and his or her client will lose the freedom of choice to direct their side of the litigation. Instead, their decisions about settlement will be constrained by the low and unworkable standard of unreasonableness.

Judicial interpretations of Section 1927 have been numerous and varied. Some courts have required a specific finding of subjective bad faith in order to impose § 1927 sanctions. Suslick v. Rothschild Securities Corp., 741 F.2d 1000 (7th Cir. 1984). Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983). Other courts have included bad faith as one of the standards that will result in the imposition of sanctions under § 1927. Lone Ranger Television, Inc. v. Program Radio Corp., 740 F.2d 718 (9th Cir. 1984) (sanction imposed on finding that counsel acted in bad faith and unreasonably multiplied proceedings); United States v. Bledgett, 709 F.2d 608 (9th Cir. 1983) (finding that counsel acted recklessly or in bad faith required); Barnd v. Tacoma, supra, 664 F.2d 1339 (authority to impose sanctions against attorney who intentionally, recklessly, or in bad faith multiplies proceedings unreasonably and vexatiously). Finally, many other courts have not discussed bad faith at all, but have relied on the words of the statute to provide the standard. Cheng v. GAF Corp., 713 F.2d 886 (2d Cir. 1983) (unreasonably multiply proceedings); Lewis v. Brown & Root, Inc., 711 F.2d 1287 (5th Cir. 1983), cert. denied, 104 S. Ct. 975 (1984) (needlessly and

vexatiously); Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223 (7th Cir. 1984) (finding that attorney filed or prosecuted claim lacking any plausible legal or factual basis required); Overnite Transportation Co. v. Chicago Industrial Tire Co., 697 F.2d 789 (7th Cir. 1983) (multiplying or delaying ongoing litigation); Malhiot v. Southern California Retail Clerks Union, 735 F.2d 1133 (9th Cir. 1984) (fees assessed because of frivolous appeal, and many misrepresentations of the record and intentional misstatement of controlling law contained in briefs).

Section 1927 also imposes some procedural requirements on the court before sanctions may be imposed. For example, Section 1927 requires that the attorney be given notice and the opportunity to be heard. Conference Report, supra n.12, at 8; see also Knorr Brake Corp. v. Harbil, Inc., supra, 738 F.2d 223; Barnd v. Tacoma, supra, 664 F.2d 1339. These procedural requirements are in place to ensure that the rights of the sanctioned parties are protected. The proposal to amend Rule 68 contains no such requirements, and therefore, no such guarantees that the rights of parties potentially liable for Rule 68 sanctions will be protected.

Finally, Section 1927 is currently available to punish attorneys who "unreasonably and vexatiously" multiply any part of the litigative proceedings. Therefore, if an attorney's misconduct in refusing a settlement offer reaches this standard he or she may be sanctioned under § 1927.

The common law bad faith doctrine and Section 1927 are general provisions available to the courts to sanction misconduct at any stage of the litigative process. If in refusing a settlement offer, a party, his attorney, or both act in such a way that their conduct violates these "bad faith" standards, the court has penalties available. In 1980 Congress was presented with the opportunity to lower the standard for measuring misconduct, but specifically and deliberately declined to do so.¹⁴ Thus the question remains whether it is appropriate for the Advisory Committee to so radically lower the standard for sanctioning misconduct during the settlement process.¹⁵

Federal Rules of Civil Procedure

In the Federal Rules of Civil Procedure, Rules 11, 26(g), and 37(b) and (d), inter alia, contain provisions granting the courts authority to sanction parties, their attorneys, or both, for certain types of misconduct. Rule 37 authorizes the imposition of sanctions against parties who abuse the discovery process by refusing to disclose information.¹⁶ The imposition of sanctions

14 See text accompanying nn. 12 & 13, supra.

15 The question of whether the Rules Enabling Act permits the Advisory Committee to so alter the standard was discussed in the Alliance's oral and written testimony (supra n.1).

16 Rule 37(b)(2) provides, in pertinent part, that in lieu of or
(Footnote continued)

against parties who refuse to comply with a court order to produce discovery is mandatory, "unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." See Rule 37(b) and (d). At least one court has held that because the sanction is mandatory, a specific finding of bad faith is not required.

Merritt v. International Brotherhood of Boilermakers, 649 F.2d 1013 (5th Cir. 1981). Despite this holding, however, that court found that bad faith could be inferred from the facts. Id. at 1019, n.14.

Other courts, however, have made express findings of bad faith when imposing the sanctions of Rule 37 (Litton Systems, Inc.

16(continued)
addition to other listed sanctions:

[T]he court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37(d) using substantially the same language provides:

In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

v. American Telephone and Telegraph Co., 700 F.2d 785 (2d Cir. 1983), cert. denied, 104 S. Ct. 984 (1984)), and have held that a finding of bad faith may warrant the extreme sanction of dismissal (National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (plaintiff's failure to timely answer written interrogatories as ordered by the district court resulted in dismissal because of flagrant bad faith and counsels' callous disregard of their responsibilities)). The party who moves to compel discovery can also be sanctioned if the motion is not substantially justified. Rule 37(a)(4); cf. Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647 (9th Cir. 1982) (fees will not be assessed against party requesting discovery if reasonable people could differ on whether compliance with the discovery request is required).

Both parties and their attorneys are subject to the imposition of Rule 37 sanctions. Indeed, since attorneys rather than parties often control the discovery process (e.g. attorneys answer interrogatories, take depositions, etc.) it seems not unusual to impose the sanctions only on the attorneys. See, e.g., Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir. 1981), cert. denied, 454 U.S. 618 (1981); Liew v. Breen, 640 F.2d 1046 (9th Cir. 1981); Merritt v. International Brotherhood of Boilermakers, supra, 649 F.2d 1013 (both parties and attorneys are liable absent indication that attorneys were acting outside scope of their authority).

Rule 26 also governs conduct during the discovery process. The rule was amended in 1983 to include new requirements for signing discovery requests and responses.¹⁷ Courts and commentators are still interpreting the way in which the amendments will be applied to discovery problems.

Rule 11 is another example of a rule which allows the court

17 Rule 26 reads, in pertinent part:

Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated.... The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation....

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

to impose sanctions to penalize those who engage in misconduct during a particular phase of the litigative process. Rule 11 requires those who submit pleadings or motions to have a reasonable basis for believing that their filings are well grounded in fact or law.¹⁸ The Advisory Committee amended rule 11 in 1983 because it believed that there was considerable confusion among both courts and attorneys about the rule's application, making the rule ineffective in deterring abuses. In enacting the proposed changes, the Committee stated its intention to "build upon and expand the equitable doctrine" wherein courts are

18 Fed. R. Civ. P. 11 provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated.... The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

permitted to award costs and attorney's fees to a party who has been forced to defend against litigation brought or maintained in bad faith. Advisory Committee Note, reprinted in 28 U.S.C.A. Fed. R. Civ. P. 11 (West Supp. 1983). Again, the sanctions may be imposed on either a party or the attorney. Historically, courts have construed Rule 11 as requiring a finding of subjective bad faith in order to assess fees. Suslick v. Rothschild Securities Corp., supra, 741 F.2d 1000; Gieringer v. Silverman, 731 F.2d 1272, 1281, 1282 (7th Cir. 1984) (willful violation of the rule or subjective bad faith required); Badillo v. Central Steel & Wire Co., supra, 717 F.2d 1160, 1167.

The sanctions for bad faith and in Section 1927 are distinguishable from those contained in the Federal Rules of Civil Procedure because they are generally available to punish the misconduct of the parties. Unlike the Federal Rules of Civil Procedure sanctions, which can be imposed only when one of the parties has abused a particular phase of the litigative process, Section 1927 and the bad faith doctrine allow sanctions for misconduct that occurs at any time during the litigation. Despite their general availability however, the standards of bad faith and Section 1927 are not substantially higher than those of Rules 11 and 37.

Proposed Rule 68

Furthermore, the sanctions provisions contained in the Federal Rules of Civil Procedure are more carefully crafted than the Rule 68 proposal. It is this attention to detail that helps to make such rules workable and effective in achieving their various goals. Although details of this type could be added to the Rule 68 proposal, that would not necessarily make it effective in achieving its goals. The proposal appears to lack the higher standards and procedural requirements in part because the settlement process is simply too subjective to be amenable to such regulation.

To allow the standards for sanctioning to be lowered in Rule 68 may result in a change that gives one party, the offeror, an unreasonable advantage over the offeree. While the offeror will be held to the good faith standard in making the offer (according to the Committee Note), the offeree will not have the protection of that standard, or even a standard that approaches bad faith, when choosing to accept or reject that offer. The offeree will have to overcome the lower, and therefore much harder to disprove, standard of mere reasonableness. The disadvantages of having to overcome this standard will strongly discourage offerees from ever rejecting an offer, even when they have meritorious claims that are worth more than the proposed settlement offer.

As explained above, any need for the proposed Rule 68 is obviated because the bad faith doctrine and Section 1927 already

provide general authority for sanctioning misconduct. Moreover, the sanctions available currently under the Federal Rules of Civil Procedure may eliminate many of the sources for delay in specific stages of the litigative process. Since a number of these rules have only recently been amended, the Alliance for Justice takes the position that, until the effects of these amendments are known, no new and radical sanctions should be added to Rule 68.

CONCLUSION

The Advisory Committee assumes, perhaps erroneously, that a settlement is always preferable to a litigated outcome, and therefore, that settlement incentives or trial disincentives are generally appropriate. In making this assumption, the proposal ignores the fact that some litigation is critical because of the principles involved. In such cases, the harm that gave rise to the plaintiff's claim may be such that the plaintiff is unwilling to quietly accept some money as his only remedy for the damage. Rather, the plaintiff may seek public exoneration as well as financial redress. For example, a plaintiff's ability to pursue his chosen career may have been threatened by an illegal action, e.g., he may have been fired because of racial discrimination on the part of his employer. For these plaintiffs, settlement may not always be an acceptable alternative to a trial.

Members of the Advisory Committee acknowledged the existence

of such suits -- where the plaintiff's principles outweigh mere financial considerations -- during the February 1, 1985 hearing on the 1984 Proposal to amend Rule 68. However, no mention or acknowledgement of the fact that settlements may not always be the preferred disposition of cases on the federal docket is made in either the proposed text of the rule or in the Committee Note. Nor is any allowance made for parties who prefer a judicial determination on the merits of their case, not simply because the parties cannot agree among themselves on the worth of the case, but because they have something more at stake than financial loss. Many of these cases involving important principles or requests for non-monetary relief may not be among the "test cases" envisioned by the Advisory Committee,¹⁹ because there may be no novel or far-reaching question of law at issue. Few parties will be able to refuse a settlement offer and risk the imposition of costly sanctions, regardless of the kind of suit, because of the broad and indeterminate nature of the standard of unreasonableness.

For all of the foregoing reasons, the Alliance for Justice submits that the Advisory Committee should withdraw its proposal to amend Rule 68.

¹⁹ The proposed rule directs judges to consider certain factors, including whether the case is a "test case," in their determination of the unreasonableness of a rejection. See supra, p. 3 for the list of those factors.

BY HAND DELIVERY

June 5, 1985

The Honorable Robert W. Kastenmeier, Chairman
Subcommittee on Courts, Civil Liberties, and
the Administration of Justice
United States House of Representatives
Room 2137B, Rayburn House Office Building
Washington, D.C.

Re: "Rules Enabling Act of 1985" (H.R. 2633)

Dear Representative Kastenmeier:

We understand that the Subcommittee on Courts, Civil Liberties, and the Administration of Justice will soon hold hearings on a revised version of an earlier bill to amend the Rules Enabling Act. We represent law school teachers and persons in public interest law organizations who are concerned about problems in the judicial rulemaking system and specifically about the contents of this bill.

We would like to commend the Subcommittee for taking an interest in reforming the statutory delegation of rulemaking authority. We appreciate the Subcommittee's sustained interest in this important subject. Unfortunately, we do not believe that H.R. 2633, as currently drafted, addresses the most fundamental problems in the current structure of the rulemaking system.

Our concerns about the rulemaking process and about this draft of the bill stem from our experiences with the current structure. As you know, the Advisory Committees of the Judicial Conference currently have under consideration two very controversial proposals that would have the effect of limiting access to the federal courts. The first proposal, which would affect civil litigants, would amend Rule 68 of the Federal Rules of Civil Procedure by imposing substantial attorney's fee sanctions on parties who reject "reasonable" settlement offers. As you also know, many judges and commentators believe this change would work a substantive alteration, and would be in direct derogation of rights accorded under the Civil Rights Attorney Fees Awards Act of 1976 (42 U.S.C. §1988) and comparable fee-shifting statutes.

The second proposal pending is to amend Rule 9 of the Rules Governing Section 2254 and 2255 Proceedings in the United States District Courts. If adopted, this proposal would dramatically

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expand the circumstances under which courts could refuse to entertain habeas corpus applications from prisoners. The proposal would permit dismissals, without decisions on the merits, in all cases in which the state or federal government can show it has been "prejudiced" (presumably in any way) by a "delay" (undefined in the proposed amendment) in the filing of an application for habeas corpus. The drafters of the rule apparently did not take sufficient cognizance of the fact that many prisoners who believe they have been unconstitutionally convicted must wait a substantial period of time to exhaust their opportunities for direct appeal and for state collateral remedies before filing habeas corpus applications.

Each of these proposals is of very doubtful merit, and both are highly inappropriate for judicial rulemaking. Each of the proposals was first advanced by an advisory committee in 1983, and each was severely criticized at hearings in early 1984. Nevertheless, each was re-published for further consideration in a revised form in 1984 -- and once again each has encountered substantial criticism at hearings held in early 1985. The Chief Justice has nevertheless continued, both publicly and privately, to urge the adoption of the two proposals. In fact, the proposal to amend Rule 9 was developed directly after the Chief Justice failed to persuade his colleagues on the Court to make a similar change in the law via case adjudication. Compare Aiken v. Spaulding, 684 F.2d 632 (9th Cir. 1982), cert. denied, 103 S. Ct. 1795 (1983) with 1983 Proposal and Advisory Committee Note (reprinted at 98 F.R.D. 337 (1983)) and 1984 Proposal and Advisory Committee Note (reprinted at 102 F.R.D. 407 (1984)). We have also learned that the Chief Justice has written directly to members of the Advisory Committee asking them to support the proposal for changes in the habeas rules.

As you and other members of the Subcommittee know, these recent developments do not represent the only time during which serious questions have been raised about the Supreme Court's exercise of its delegated rulemaking authority. The habeas corpus rules amendments that the Court forwarded in 1976 required Congressional hearings and revision (see Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15 (1977)), as did the proposed Federal Rules of Evidence (see Pub. L. No. 93-595 (1975)). There seems to be a continuing pressure at the Judicial Conference and the Court to expand "procedural" rulemaking into areas which involve or affect substantive rights, and we have found no signs of any institutional effort to curb this tendency.

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Therefore, while we agree completely that reforms are needed in this process (and appreciate the Subcommittee's interest in making them), we believe that H.R. 2633 omits several of the most important, and most fundamental, reforms. One of the most basic problems with the current rulemaking process is that there is no adequate system of checks and balances to ensure that the Supreme Court and the committees of the Judicial Conference confine their rulemaking to the scope of the congressional delegation. The Supreme Court promulgates the rules, and the Supreme Court reviews them if they are challenged. This system contrasts sharply with other rulemaking processes. Rulemaking by executive branch or independent agencies can be "checked" by two other branches of government: by Congress if it is dissatisfied with the agency's exercise of its delegated authority and by an independent judiciary. Federal judicial rulemaking, however, is subject only to a limited Congressional check during the "layover" period (during which Congress must pass affirmative legislation and secure a presidential signature to delay or revise any rules proposal other than one affecting evidentiary privileges), and it is not controlled by any other branch or governmental entity. In fact, several justices of the Supreme Court have previously objected to their role in the promulgation of the rules on the grounds that they were required to precommit on issues that would later come before them for review. See, e.g., Order, 323 U.S. 821, 822 (1944) (memorandum of Justice Frankfurter). Commentators also have observed that because of this dual role in its decisions reviewing rulemaking the Court's objectivity has been compromised; the Court's opinions in Sibbach v. Wilson & Co., 312 U.S. 1 (1941) and Hanna v. Plummer, 380 U.S. 460 (1965) have been cited as examples of this problem. For these reasons, and in light of our recent experiences with Rule 68 and Rule 9, we do not think legislation such as H.R. 2633 which retains the Supreme Court in its present rulemaking role will produce effective and meaningful reform in this process.

In addition to our general concern about the statute, we have the following specific comments about points contained within or pertinent to H.R. 2633:

1. We commend the fact that H.R. 2633 does not provide the rulemakers with authority to "supercede" statutes. As you know, we believe it is appropriate, both historically and legally, that this supercession or "trumping" authority, contained in the 1934 Act, not be reenacted.

2. We also applaud the provisions of section 2073(d) which require the rulemaking body making a recommendation to provide a

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written report (including any minority or separate views) as well as an explanatory note on any proposed rules. This change represents a useful step forward. Since the "gap reports" that are currently written are not publicly available (see Rules Enabling Act; Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st and 2nd Sess. 31 (1983 & 1984) [hereinafter cited as Hearings]), it is important for the commentary accompanying this section of the bill to make clear your intent to have these reports publicly maintained and available.

3. H.R. 2633 continues the present practice of allowing the Chief Justice to appoint all of the members of the advisory committees and the Standing Committee. Your earlier bill, H.R. 4144, would have provided for the Judicial Conference, not the Chief Justice, to make these appointments. In this and several other respects, the earlier bill made the types of improvements that many commentators had urged. Recent history, and in particular the developments with respect to the proposed amendment to Rule 9 in the habeas corpus area, furnishes illustration of the need to redistribute responsibility for various aspects of the rulemaking structure and process.

4. H.R. 2633 continues the present practice of not limiting the length or the number of terms served by members of the Advisory Committees or the Standing Committee. In this respect, your earlier bill (H.R. 4144) which would have limited the terms of service was far better.

5. Section 2072(c)(1) of the bill, which provides for more open meetings, is problematic insofar as: (a) it allows for the closing of a meeting simply upon a determination by committee members (who have testified that they much prefer deliberating in private, see Hearings at 11, 18-19, 91, 100-102) that it is "in the public interest" to close meetings, and (b) the "legislative history" to date on this provision of the bill (contained in the section-by-section analysis of H.R. 6344) is very ambiguous (see Hearings at 174-76). As you know, the Sunshine in Government Act provisions under which many other agencies operate contain far more exacting openness requirements. At a minimum, we urge that provisions be included in this legislation requiring the committee members to give specific reasons for voting to close meetings to the public, and that the legislation include a presumption in favor of open meetings.

6. We also suggest that, to assure informed congressional consideration during the "layover" period, the full minutes of any

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meetings that are closed by committee vote be maintained and made available to the House and Senate Judiciary Committees when the pertinent rules proposals are forwarded.

7. H.R. 4144 contained a nine-month congressional layover period. This was a distinct improvement over the current periods, which are too short. Unfortunately, H.R. 2633 shortens the time to seven months.

8. We are opposed to the inclusion of the sentence in Section 2074(a) of the bill which allows the Supreme Court to "fix the extent [to which] such [newly promulgated] rule[s] shall apply to proceedings then pending." There will be circumstances in which it would be particularly unfair to apply newly developed rules to litigants in pending cases (who had proceeded in reliance upon the earlier set of rules). For a number of years the rulemakers have included provisions in Federal Rule of Civil Procedure 86 (or in the orders accompanying the rules) instructing that once rules take effect:

They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.
(Emphasis supplied.)

Unless and until this type of provision is shown to be inadequate, it is unnecessary and may be counterproductive to assign the Supreme Court the task of determining, in advance, to what extent each newly promulgated rule shall apply to a pending proceeding.

9. Section 2074(a) of the bill should make explicit that if amendments to a statute are necessary to implement a proposed rule, the rule will not take effect unless Congress affirmatively enacts those amendments.

10. Section 3 of the bill, which provides for the Judicial Conference to periodically review local rules, should include a minimum time period for that review, such as every two years.

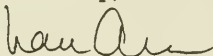
11. Commentators have repeatedly criticized the fact that neither the Supreme Court nor any of the Judicial Conference committees has developed a set of guidelines delineating what they

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believe to be the scope of their authority to promulgate procedural (but not substantive) rules. See Burbank, The Rules Enabling Act, 130 U. Penn. L. Rev. 1015, 1194-97 (1982). The bill should include a specific requirement that the Judicial Conference develop such a set of internal controls, and furnish a copy to Congress.

Thank you for the opportunity to comment on this legislation. Again, we wish to commend the Subcommittee for its sustained interest in this matter, and to urge continued oversight and revision. Please do not hesitate to contact us if you have any questions. We would appreciate being kept apprised of revisions in the bill.

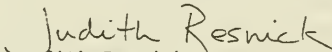
Sincerely,



Nan Aron
Alliance for Justice



Laura Macklin
Institute for Public Representation



Judith Resnick
Dennis E. Curtis
William Genego
University of Southern California
Law School

LM/ntl

Copies: Subcommittee Members

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

EDWARD T GIGNOUX
CHAIRMAN

July 11, 1985

JOSEPH F SPANIOL, JR
SECRETARY

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Committee on the Judiciary
United States House of Representatives
2232 Rayburn House Office Building
Washington, D.C. 20515

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MOREY L SEAR
BANKRUPTCY RULES

Dear Mr. Chairman:

I am pleased to submit a Prepared Statement setting forth my views, as Chairman of the Judicial Conference Standing Committee on the Rules of Practice and Procedure, on the provisions of H.R. 2633, the "Rules Enabling Act of 1985," the bill introduced by you on May 23, 1985, to amend the Rules Enabling Acts. I appreciate your courtesy in permitting me to submit these written comments, and regret that I was unable to appear and testify in person at the hearing conducted by the Subcommittee on June 6, 1985.

H.R. 2633 is the second revision of H.R. 4144, 98th Congress, 1st Session, the original bill introduced by you on October 18, 1983. At the hearing conducted by the Subcommittee on March 1, 1984, I was privileged to present the views of the Judicial Conference, which endorsed those of the Standing Committee, on H.R. 4144. To the extent that H.R. 2633 carries forward the provisions of H.R. 4144, the views of the Conference are already in the hearing record. Neither the Standing Committee nor the Judicial Conference has had an opportunity, however, to review the new bill and to formulate views concerning it. Accordingly, the enclosed Statement sets forth my own views, and not those of the Standing Committee or the Conference, on those provisions of the present bill which differ from the original bill.

At the outset, may I commend the Subcommittee on its continuing interest in perfecting the federal rulemaking process. In my view, H.R. 2633 is a substantial improvement over the earlier drafts, and I am pleased to note that it incorporates many of the suggestions made on behalf of the Conference at the previous hearing. As more fully set forth in my Statement, however, H.R. 2633 contains several provisions that I find disturbing:

- (1) H.R. 2633 does not include the provision in the current Rules Enabling Acts permitting judicially promulgated rules to supersede conflicting procedural statutes. I am concerned

Honorable Robert W. Kastenmeier
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that the elimination of this supersession authority could lead to fruitless satellite litigation challenging the validity of a rule solely because it arguably may conflict with some obscure procedural statute.

- (2) Proposed Section 2072(b) of Title 28 would provide that "Such rules shall not ... supersede any provision of a law of the United States." It seems to me that every rule of procedure, when effective, becomes "a law of the United States," whether promulgated by the Supreme Court or enacted by Congress. Thus, any proposed amendment to an existing rule would appear to be a change in "a law of the United States," and the Supreme Court would be powerless to act. This new provision could effectively destroy the rulemaking process as we know it today.
- (3) Proposed Section 2074(a) of Title 28 would require that the Supreme Court transmit with a proposed rule proposed amendments to any law "to the extent such amendments are necessary to implement such proposed rule" This provision presumably would require the Court to render an advisory opinion as to whether a proposed rule conflicts with an existing statute. Under Article III of the Constitution, the Supreme Court cannot, of course, render advisory opinions.
- (4) H.R. 2633 would require open committee meetings. As I previously testified, the Judicial Conference and the Standing Committee are of the view that this "sunshine" proposal is unnecessary and would seriously impair the efficient functioning of the rulemaking process, without any significant public benefit. We believe that our present procedures, as codified in the "Statement of Operating Procedures" adopted by the Standing Committee and approved by the Conference, adequately achieve the objective of full public awareness and participation in rulemaking.

My Statement contains a number of other comments and suggestions, which I hope may be helpful. Again, I appreciate the opportunity to submit my views on this important bill.

Sincerely,


Edward T. Gignoux

PREPARED STATEMENT

OF

HONORABLE EDWARD THAXTER GIGNOUX

UNITED STATES SENIOR DISTRICT JUDGE
FOR THE DISTRICT OF MAINE

and

CHAIRMAN OF THE STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

before the

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

on

H.R. 2633,
A BILL TO AMEND THE RULES ENABLING ACTS

July 10, 1985

Mr. Chairman, and Members of the Subcommittee, I submit this Prepared Statement in response to Chairman Rodino's request for my views, as chairman of the Judicial Conference Standing Committee on Rules of Practice and Procedure, on the provisions of H.R. 2633, the "Rules Enabling Act of 1985," a bill introduced by you, Mr. Chairman, on May 23, 1985, to amend the provisions of Titles 18 and 28 of the United States Code, commonly called the Rules Enabling Acts. I appreciate your courtesy in permitting me to submit these written comments, and regret that time constraints made it impossible for me to appear and testify in person at the hearing conducted by the Subcommittee on June 6, 1985.

INTRODUCTION

H.R. 2633 is substantially similar to the measure approved by the Subcommittee last Congress, H.R. 6344, 98th Congress, 2nd Session, and introduced by the Chairman on October 1, 1984. H.R. 6344, in turn, was a revision of H.R. 4144, 98th Congress, 1st Session, the original bill introduced by the Chairman on October 18, 1983. As stated by you, Mr. Chairman, in your remarks when introducing H.R. 2633, this bill is the product of two days of hearings at the last Congress and a substantial amount of work by the Subcommittee. See Rules Enabling Act, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 98th Congress, 1st and 2nd sessions (April 21, 1983, and March 1, 1984), Serial #96 (1985) (hereinafter "Hearings"). I commend the Subcommittee on its continuing interest in perfecting the Federal rulemaking process.

At the hearing conducted by the Subcommittee on March 1, 1984 I was privileged to submit the views of the Judicial Conference, which had

endorsed those of the Standing Committee, on H.R. 4144, 98th Congress. See Hearings at 88 (Testimony), at 93 (Statement). I am pleased to note that the present bill incorporates many of the views expressed on behalf of the Judicial Conference at the previous hearing.

To the extent that H.R. 2633 carries forward provisions of H.R. 4144, 98th Congress, the views of the Judicial Conference are already in the hearing record, and I shall attempt to avoid repeating them at this time. Neither the Judicial Conference nor the Standing Committee has had an opportunity, however, to formulate final views on the present bill. Since H.R. 2633 modifies H.R. 4144, 98th Congress, in several significant respects, in commenting thereon, I am necessarily presenting my own views and not those of the Judicial Conference or the Standing Committee.

COMMENTS

My comments with respect to the provisions of H.R. 2633 are as follows:

SECTION 1. SHORT TITLE

I have no comment.

SEC. 2. RULES ENABLING ACT AMENDMENTS

SEC. 2(a) IN GENERAL.

Section 2(a) of H.R. 2633 (with Section 5(a) and (b)) would repeal the present Rules Enabling Acts, 28 U.S.C., Sections 2072, 2075, 2076, 18 U.S.C. Sections 3771, 3772 (chapter 237) and 18 U.S.C. Section 3402 (second paragraph), and would consolidate all rules enabling provisions into new Sections 2072, 2073, and 2074 of Title 28.

Proposed Section 2072. Rules of procedure; power to prescribe

Proposed Section 2072 contains two subsections:

Section 2072(a) would vest the rulemaking authority in the Supreme Court, as at present. I support this provision. The original bill, H.R. 4144, 98th Congress, would have transferred the rulemaking authority from the Supreme Court to the Judicial Conference. I understand that the current provision responds to the concern expressed by the Conference of State Chief Justices that the prestige and authority of the Court are important to acceptance of the rules, not only within the Federal judicial system but by the many States which have adopted the Federal Rules of Procedure, either in whole or in part. See Letter to the Honorable Robert W. Kastenmeier from the Honorable John A. Speziale, Chairman, Committee on State-Federal Relations, Conference of Chief Justices, dated March 6, 1984, Hearings at 231. I further understand that the Justices have concluded that it would be better that the rulemaking process continue to be conducted under the aegis of the Supreme Court. See Letter to the Honorable Robert W. Kastenmeier from the Chief Justice, dated June 25, 1984, Hearings at 195. I agree that the prestige and authority of the Court are important to acceptance of the rules in both the Federal and State judicial systems.

Section 2072(b) would provide that the rules promulgated by the Supreme Court "shall not abridge, enlarge, or modify any substantive right or supersede any provision of a law of the United States." I support the first clause of the subsection, which carries forward the present limitation on judicial rulemaking in 28 U.S.C. §§ 2072 (Rules of Civil Procedure) and 2075 (Bankruptcy Rules). I am disturbed, however, by two features of proposed Section 2072(b) which could lead to

unnecessary satellite litigation and potentially destroy the rulemaking process as it exists today:

- (1) I am concerned that H.R. 2633 does not incorporate the provision in the current Rules Enabling Acts permitting judicially promulgated rules to supersede conflicting procedural statutes. The Rules Enabling Act of 1934 (Act of June 19, 1934, c. 651, §§ 1, 2, 48 Stat. 1064, as amended, 28 U.S.C. § 2072) contained a provision that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." This supersession authority was necessary because of the numerous procedural statutes then contained in the United States Code. Although the Judicial Code of 1948 eliminated many of these obsolete procedural provisions, subsequently enacted Rules Enabling Acts have included a supersession provision, permitting judicially promulgated rules to supersede conflicting statutes, always subject to the limitation that the rules shall not "abridge, enlarge, or modify any substantive right." See 28 U.S.C. § 2076 (Rules of Evidence), 18 U.S.C. § 3771 (Rules of Criminal Procedure: Procedure to and including verdict), 18 U.S.C. § 3772 (Procedure after verdict). I am not aware that this supersession authority has caused any difficulty. And I am concerned that its elimination could open up the potential that any rule--whether an appellate, civil, criminal, bankruptcy or evidence rule--may be challenged as arguably conflicting with a procedural statute. Congress should not encourage this type of unnecessary

satellite litigation, which is expensive for the parties and time-consuming for the courts.

I am aware that some commentators have derived from Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983), a potential constitutional problem, based on Separation of Powers principles, in permitting judicially promulgated rules to supersede congressionally enacted statutes. While I do not purport to be a constitutional law scholar, I do not perceive any serious constitutional objection to Congress delegating the rulemaking power to the Judicial Branch, reserving the opportunity to review proposed rules changes before they become effective and to pass legislation suspending or modifying any rules found objectionable. I do not read in Chadha any implication that the "report and wait" provisions of the Rules Enabling Acts run afoul of the Separation of Powers doctrine, upon which Chief Justice Burger's opinion is bottomed. Chadha held that the one-house veto provision of Section 244 of the Immigration and Naturalization Act was unconstitutional because Congress is authorized to act in the legislative area only by approval of both the House and the Senate, and presentment to the President. Except for the Evidence Rules, the Federal rules are not presently promulgated under such a scheme. Nor would they be under the procedure proposed by H.R. 2633. Under proposed Section 2074(a), rules amendments would be transmitted to Congress and would become effective, without more, on a specified date unless Congress passes legislation

barring their effectiveness.* The Chief Justice in Chadha specifically recognized the validity of this "report and wait" process as having been approved by the Supreme Court in Sibbach v. Wilson & Co., 312 U.S. 1 (1941). See Chadha, 462 U.S. at 935 n.9. As he noted in Chadha, the "report and wait" process is not a legislative veto.

As Professor Charles A. Wright has observed, see Wright & Miller, Federal Practice and Procedure: Civil § 1001 (1969 & 1985 Supp.), there is no consensus of opinion among constitutional scholars on the question of whether the power to regulate judicial procedure in the United States lies exclusively with Congress or with the judiciary. Able commentators insist that the right to make rules of procedure is inherent in the judicial power vested in the courts by Article III of the Constitution. Dean Roscoe Pound and Professor John Wigmore, among others, espoused this view. Other commentators assert that the power to make procedural rules is a legislative, not a judicial, power. The merits of these competing legal arguments have been a fruitful subject for debate. I suggest, however, that the question really is of no practical importance. The fact is that for 50 years in the Federal courts we have been operating under a process which may be best described as judicial rulemaking pursuant to

*H.R. 2633 would eliminate the one-house veto provision, similar to that condemned in Chadha, that is contained in the present Evidence Rules Enabling Act, 28 U.S.C. § 2076.

congressional delegation and subject to review by the Congress. See Wright & Miller, supra § 1001 at 30. This accommodation has worked well and has avoided a confrontation on constitutional principles.

- (2) I am particularly disturbed by the added provision in Section 2072(b) that "Such rules shall not . . . supersede any provision of a law of the United States." It seems to me that every procedural rule, when effective, becomes "a law of the United States," whether promulgated by the Supreme Court or enacted by Congress, as has been the case in recent years. See, e.g., P.L. 93-595, § 1, app. Jan. 2, 1975 (Federal Rules of Evidence); P.L. 97-462, app. Jan. 12, 1983 (Civil Rule 4); Comprehensive Crime Control Act of 1984, P.L. 98-473, app. Oct. 12, 1984 (Criminal Rules). Potential destruction of the entire rulemaking process could result from this provision because any proposed amendment to an existing rule would appear to be a change in "a law of the United States," and the Supreme Court would be powerless to act. Moreover, this new provision could lead to fruitless satellite litigation challenging the validity of a rule solely because it arguably superseded some obscure procedural statute. I suggest that the seven months "layover period" which would be provided by proposed Section 2074(a) should be sufficient to permit Congress to determine whether a proposed rule conflicts with an existing statute, and, if so, to make any appropriate modification.

Proposed Section 2073. Rules of procedure: method of prescribing

Proposed Section 2073 contains several subsections:

Section 2073(a)(1) would require the Judicial Conference to prescribe and publish the procedures for the consideration of proposed rules. I do not object to this provision, but question that it is necessary. The Standing Committee has already published such procedures, which have been approved by the Conference. See Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, Hearings at 112. This subsection merely continues that responsibility.

Section 2073(a)(2) would provide that the Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under Section 2072. I endorse this provision. At the present time there are four such advisory committees, one each for Appellate, Civil, Criminal and Bankruptcy Rules. I am pleased to observe that the discretionary language of the present bill responds to the Judicial Conference's criticism of H.R. 4144 as creating undesirable inflexibility. Section 2073(a)(2) also would provide that each rules committee shall consist of "a balanced cross section of bench and bar, and trial and appellate judges." I approve this provision, which is consistent with the requirement of the 1958 Judicial Conference resolution establishing the rules program. See Rules of Practice and Procedure for the United States Courts, Hearings at 109. It is my belief that the present rules committees are broadly representative. They include experienced district and circuit judges, members of the bar, and law professors, widely distributed geographically and chosen

from diverse professional backgrounds. A current list of rules committees members is attached to this Statement as Appendix A.

Section 2073(b) would require the Judicial Conference to authorize the appointment of a Standing Committee on Rules of Practice and Procedure. The Standing Committee is to review each recommendation of any other committee and recommend to the Conference such changes in rules proposed by a committee "as may be necessary to maintain consistency and otherwise promote the interest of justice." In addition, the Standing Committee would have independent authority to recommend rules. I support these provisions, which are in accord with present practice.

Section 2073(c)(1) and (c)(2) would require that all rules committee meetings be open to the public (except when a majority of the committee votes in open session to close a meeting, stating the reason therefor); would require that minutes of each meeting be prepared and made available to the public; and would require that sufficient notice of each meeting be given "to enable all interested persons to attend." For the reasons set forth in my Testimony and Prepared Statement at the previous hearing, see Hearings at 91 (Testimony); 100-02 (Statement), the Judicial Conference and the Standing Committee are of the view that this "sunshine" proposal is unnecessary and would seriously impair the efficient functioning of the rulemaking process without any significant benefit to the public or to the members of the bar. As there stated, we concur fully in the objective of full public awareness and participation in rulemaking, but we believe that our present procedures, as codified in the "Statement of Operating Procedures," adequately achieve this end. Opportunity for public participation in the rulemaking process is

assured by the wide circulation given to proposed rules changes and by the opportunity afforded any interested person either to submit written comments or to attend and present oral views at the public hearings that are held on the draft rules. In addition, the written comments received, the transcripts of public hearings, the minutes of Rules Committee meetings, and the Advisory Committee and Standing Committee reports are available to the public at the Administrative Office of the United States Courts.

Section 2073(d) would require that any recommended rule change set forth "a proposed rule, an explanatory note on the rule, and a written report explaining the [rulemaking] body's action, including any minority or other separate views." I approve this requirement, which is in accord with present practice.

As a drafting matter, it appears that at page 3, lines 24-25, the words "or under section 2072" should be deleted. Section 2072 authorizes the Supreme Court to "prescribe," not to "recommend," rules of practice and procedure.

Section 2073(e) would provide that failure to comply with Section 2073 does not invalidate a rule. I endorse this provision, which was suggested by the Judicial Conference, and others. It is essential to avoid satellite litigation challenging the validity of a rule solely because of alleged noncompliance with a minor procedural requirement of Section 2073.

Proposed Section 2074. Rules of procedure; submission to Congress; effective date

Proposed Section 2074 contains two subsections:

Section 2074(a) would require that rules amendments be transmitted to Congress by May 1, to become effective no earlier than December 1 of the year in which they are transmitted, the Court being authorized to fix the extent to which a rule shall apply to pending proceedings. The current Rules Enabling Acts require that rules changes be transmitted to Congress by May 1, to become effective after a waiting period of not less than 90 days (180 days for the Evidence Rules). As set forth in my previous Testimony and Prepared Statement, see Hearings at 91-92 (Testimony); 96-97 (Statement), the Judicial Conference is of the view that it is for Congress to determine the amount of time it needs to consider rules changes, but that a uniform waiting period should be provided for all rules. The proposal in the present bill appears reasonable, and I have no suggestions with respect to it.

Section 2074(a) also would require that the Supreme Court transmit with a proposed rule proposed amendments to any law, "to the extent such amendments are necessary to implement such proposed rule or would otherwise promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." I question this provision on both legal and practical grounds. It would appear to require the Court to render an advisory opinion as to whether a proposed rule conflicts with an existing statute. Under Article III of the Constitution, which limits the judicial power to the decision of "cases" and "controversies," the Supreme Court cannot, of course, render "advisory opinions." See Flast v. Cohen, 392 U.S. 83, 95 (1968); Wright, Law of Federal Courts at 57 (4th ed. 1983).

As a drafting matter, I cannot understand the purpose of the language at page 4, lines 17-20, which is confusing and appears to be unnecessary.

Section 2074(b) would provide that "any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." This provision incorporates the language of 28 U.S.C. § 2076 (Rules of Evidence). I have no comment on it.

SEC. 2(b). ADVISORY COMMITTEES FOR COURTS.

Section 2(b) of H.R. 2633 would amend 28 U.S.C. § 2077(b) by striking out "of appeals" in the first line and inserting ", except the Supreme Court, that is authorized to prescribe rules of the conduct of such court's business under section 2071 of this title," and also by striking out "the court of appeals" in the third and fourth lines and inserting "such court." Section 2077(b) of Title 28 presently requires each court of appeals to appoint an advisory committee to study and to make recommendations concerning the court's rules of practice and internal operating procedures. The proposed amendments would also require the district courts, and all other courts established by Act of Congress (but not the Supreme Court), to appoint such advisory committees. A number of district courts have appointed such committees; it is clearly a desirable practice; and I endorse this provision.

SEC. 2(c) CLERICAL AMENDMENT.

I have no comment on this subsection.

SEC. 3. COMPILATION AND REVIEW OF LOCAL RULES

Section 3 of H.R. 2633 would amend 28 U.S.C. § 331 in two respects:

(1) Section 3 would insert in the fourth paragraph of Section 331 a requirement that the Judicial Conference periodically compile the rules and orders prescribed under 28 U.S.C. §§ 372(c)(11) and 372(c)(15). Section 372(c) of Title 28, the Judicial Discipline Act, P.L. 96-458, § 3(a) (1980), is not within the jurisdiction of the Standing Committee, and I shall not comment thereon.

(2) Section 3 would add after the fifth paragraph of Section 331 a new paragraph requiring the Judicial Conference periodically to compile the rules prescribed under 28 U.S.C. § 2071 by courts other than the Supreme Court so as to provide a current record thereof. The new paragraph would also require the Conference periodically to review such rules for consistency with rules prescribed under proposed Section 2072 of Title 28 and would authorize the Conference to modify or abrogate any rule found inconsistent. I question the necessity of a requirement that the Judicial Conference maintain a current record of circuit and district court rules. The Administrative Office of the United States Courts is the appropriate body to maintain a compilation of such rules. I also question that the Judicial Conference should be required to review district court rules for consistency with the Federal Rules of Procedure. Section 4(a)(2) of H.R. 2633, post, would require such review of district court rules by the judicial councils. Review by the Judicial Conference would be unnecessarily duplicative and wasteful of judicial time and resources. Finally, if the suggested revision of Section 4(b) of H.R. 2633, post, is accepted, Section 3(2) can be deleted as unnecessary.

SEC. 4. RULES BY DISTRICT COURTS AND ORDERS BY CIRCUIT
JUDICIAL COUNCILS AND THE JUDICIAL CONFERENCE

SEC. 4(a) RULES BY DISTRICT COURTS

Section 4(a) of H.R. 2633 contains two subsections:

Section 4(a)(1) would amend 28 U.S.C. § 2071 by striking out "by the Supreme Court" and inserting "under section 2072 of this title," and by adding the following new paragraph[s] (aic):

"Any such rule of a district court shall be made or amended only after giving appropriate public notice and an opportunity for comment. Such rule so made or amended shall take effect upon the date specified by the district court and shall remain in effect unless modified or abrogated by the District Court or modified or abrogated by the judicial council of the relevant circuit. Copies of such rules so made or amended shall be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public."

The proposed new paragraph in all material respects tracks the language of proposed Civil Rule 83 (Rules by District Courts) and proposed Criminal Rule 57 (Rules by District Courts) now pending before the Congress. See Amendments to the Federal Rules of Civil Procedure, Communication from the Chief Justice of the United States, April 30, 1985, 99th Congress, 1st Session, House Document 99-63; Amendments to the Federal Rules of Criminal Procedure, Communication from the Chief Justice of the United States, April 30, 1985, 99th Congress, 1st Session, House Document 99-64. I suggest that incorporation of the same provisions in a statute is unnecessary.

Section 4(a)(2) of H.R. 2633 would amend 28 U.S.C. § 332(d) by adding the following new paragraph:

"(4) Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such a review."

The proposed new paragraph would require each judicial council periodically to review district court rules for consistency with rules prescribed under proposed Section 2072 of Title 28 and would authorize the council to modify or abrogate any such rule found inconsistent. It is a reasonable requirement, and I have no comment.

SEC. 4(b) ORDERS BY CIRCUIT JUDICIAL COUNCILS.

Section 4(b) of H.R. 2633 would amend 28 U.S.C. § 332(d)(1) by inserting after the first sentence the following new sentence:

"Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council. Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to the public."

I sense that the intent of the drafters of this subsection was to create a procedure for the promulgation of circuit court rules which would parallel that for the promulgation of district court rules. Since circuit court rules are promulgated by the courts of appeals and not by

the circuit councils, the proposed amendment to Section 332(d)(1) of Title 28 does not seem appropriate. If I am correct as to the Subcommittee's intent, I suggest that Section 4(b) of H.R. 2633 be revised to read substantially as follows:

"(b) RULES BY CIRCUIT COURTS.--(1) Section 2071 of title 28 of the United States Code is amended by adding at the end the following paragraph:

"Any such rule of a court of appeals shall be made or amended only after giving appropriate public notice and an opportunity for comment. Such rule so made or amended shall take effect upon the date specified by the court of appeals and shall remain in effect unless modified or abrogated by the court of appeals or modified or abrogated by the Judicial Conference. Copies of such rules so made or amended shall be furnished to the Administrative Office of the United States Courts and be made available to the public."

"(2) Section 331 of title 28 of the United States Code is amended by adding after the fifth paragraph the following new paragraph:

"The Judicial Conference shall periodically review the rules which are prescribed under section 2071 of this title by courts of appeals for consistency with rules prescribed under section 2072 of this title. The Judicial Conference may modify or abrogate any such rule found inconsistent in the course of such a review."

SEC. 4(c). RULES BY JUDICIAL CONFERENCE AND CIRCUIT JUDICIAL COUNCILS.

Section 4(c) of H.R. 2633 would amend 28 U.S.C. § 372(c)(11), the Judicial Discipline Act. That Act is not within the jurisdiction of the Standing Committee, and I shall not comment thereon.

SEC. 5. CONFORMING AND OTHER TECHNICAL AMENDMENTS.

Section 5 of H.R. 2633 contains technical and conforming amendments. I have no comment thereon.

SEC. 6. SAVINGS PROVISION.

Section 6 of H.R. 2633 is the savings clause. It would provide that rules prescribed in accordance with law before the effective date of the Act and still in effect shall remain in force until changed pursuant to the law as modified by the Act. Similar savings clauses have been included in earlier Rules Enabling Acts. This provision is reasonable, and I have no comment.

SEC. 7. EFFECTIVE DATE.

Section 7 of H.R. 2633 would provide that the Act shall take effect December 1, 1986. This effective date appears reasonable, and I have no comment.

CONCLUSION

I thank you, Mr. Chairman and Members of the Subcommittee, for the privilege of submitting these views.

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225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

JACK B. WEINSTEIN
CHIEF JUDGE

July 15, 1985

My dear Chairman Kastenmeier:

Please excuse my delay in responding to your letter of June 11 seeking my views on H.R. 2633, particularly as the bill affects local rules.

You have my prior view on the desirability of removing power to enact district and court of appeals rules from the Supreme Court. See my book, articles and letter of May 31, 1983, reprinted at Hearings of April 21, 1983 and March 1, 1984, p. 196. I recognize, however, the power of the Chief Judge's suggestion. *Id.* at p. 195. It may provide a workable compromise in fact. I therefore do not strongly oppose the provision of the bill retaining the present rule-making power of the Supreme Court.

The provisions for public sessions and participation are important. They should not be watered down further.

The requirement of compilations of local rules is sensible. Power in the Judicial Conference to abrogate or modify the rules is sound.

I strongly oppose giving the judicial councils the power to modify or abrogate local district court rules. Judicial Conference power is sufficient and should not be diluted by simultaneous power in the councils. Giving two bodies responsibility may result in neither doing the job properly.

I serve on both the United States Judicial Conference and the Second Circuit Council. Based on that experience I have no doubt that the Conference rather than the councils should have supervisory authority. The Conference will be able to use the information acquired in supervising local rule-making to achieve necessary national uniformity. Such information may be helpful in revising the civil, criminal and other national rules.

Hon. Robert W. Kastenmeier

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July 15, 1985

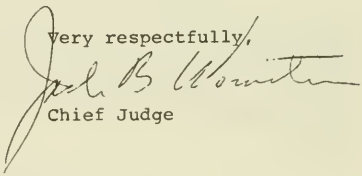
Giving the judicial councils supervisory authority over local court rules would decrease the ability to seek national uniformity. Lack of uniformity by circuit would be more serious than lack of uniformity by district, because it would be less amenable to change on the national level by rule-making. An individual district would be less able to block movement toward change than would an entire circuit.

Bear in mind that the judicial councils are primarily made up of court of appeals judges, many having little trial experience, while almost fifty percent of the members of the Judicial Conference are district judges. In the Second Circuit, for example, the Circuit Council has 11 members from the court of appeals and six from the district courts (one from each of the districts in the circuit). This new power may well lead to disputes that will create unnecessary tensions within the circuit between district and court of appeals judges. It will result in further confusion about the appropriate roles of district judges and court of appeals judges in supervising district court procedures. The more appropriate way for the court of appeals to supervise is by the case-by-case adversarial common law method. Advisory opinions on local court rules at the court of appeals level are not, in my opinion, desirable.

We are in the process of trying to revise our practice in the Eastern District of New York to improve our efficiency in properly addressing the merits of cases more quickly and in reducing costs to the system and litigants. In that connection, enclosed for your information is a pamphlet containing the joint local rules of the Southern and Eastern Districts of New York, which is designed to assist lawyers practicing in the New York metropolitan area. Also enclosed are the standing orders on discovery of the Eastern District of New York, which embody the results of long public discussions by the court, the Wesley Committee and the Bar. Having the Court of Appeals participate in this process with power to order changes would only inhibit and prevent desirable improvements.

With all best wishes,

Very respectfully,


Chief Judge

Honorable Robert W. Kastenmeier
Chairman,
Subcommittee on Courts, Civil Liberties and
the Administration of Justice
House of Representatives
Committee on the Judiciary
Washington, D.C. 20515

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August 7, 1985

Honorable Edward Thaxter Gignoux
 United States District Judge
 156 Federal Street
 P.O. Box 8
 Portland, Maine 04112

Dear Judge Gignoux:

Thank you for your thoughtful letter of July 11, 1985 concerning H.R. 2633. I appreciate your continuing efforts to help the Subcommittee develop legislation that will improve the rulemaking process.

As you indicated, many of your comments simply restate positions previously taken by the Judicial Conference. H.R. 2633, however, has two provisions that have not been officially addressed by either the Conference or the Standing Committee. In order to facilitate this review process I am writing to explain the rationale behind these two provisions. I hope that the Standing Committee and the Conference will, in light of

Judge Edward Thaxter Gignoux
August 7, 1985

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my comments, reassess some of the views stated in your letter.

The most important new issue raised by H.R. 2633 concerns the supersession clause, which states that, "All laws in conflict with any such rules [i.e., those promulgated under the enabling acts] shall be of no further force or effect after such rules have taken effect." ¹ H.R. 2633 does not carry forward this clause for two reasons. First, the original reasons for the clause have long since disappeared, and therefore it is unnecessary. Second, there is substantial doubt concerning the clause's constitutionality.

The supersession clause was part of the original Rules Enabling Act of 1934 largely because it had been part of the original House/American Bar Association proposal of 1914.² That proposal had included supersession authority because there were numerous federal procedural statutes which would have been difficult to identify in advance of the promulgation of the rules. In addition, supersession authority was thought necessary to avoid conflict with the Conformity Act.³ Neither condition exists today. In fact, neither condition has existed since the 1948 recodification of the United States Code which eliminated

1. 28 U.S.C. §2072 (1982). See also 28 U.S.C. 2075, 2076; 18 U.S.C. 3171, 3772.

2. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1050-54 (1982).

3. Id.

Judge Edward Thaxter Gignoux
August 7, 1985

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most of the practice and procedure statutes and repealed the Conformity Act.

Not only has the supersession clause fulfilled its purpose, but current Congressional practice makes supersession unnecessary. Today, Congress tends to legislate against the backdrop of the existing Federal rules of practice and procedure.⁴ In addition, Congress has responded promptly when the Judicial Conference has criticized practice or procedure statutes which interfere with the efficient and just administration of the judicial system. For example, over many Congresses a series of civil priorities were engrafted into the United States Code. Judicial Conference criticisms of these mischievous provisions led Congress, at the urging of my Subcommittee, to repeal them.⁵ Interestingly, the Judicial Conference never attempted to supersede those statutory priorities by recommending rules in conflict with the statutes establishing them. Thus, in practical terms, the supersession authority is

⁴. See, e.g., Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§215, 216, 98 Stat. 1837, 2014-17 (1984) (amends Rules 32, 35, 38, 40, 54, and 6(e)(3)(c) of the Federal Rules of Criminal Procedure, and Rule 9 of the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates).

⁵. Act of Nov. 8, 1984, Pub. L. No. 98-620, §401, 98 Stat. 3335, 3356-57 (1984). See H.R. Rep. No. 98-1062, 98th Cong., 2d Sess. (1984).

Judge Edward Thaxter Gignoux
August 7, 1985

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unnecessary.⁶

The second reason for eliminating the supersession authority is the substantial doubt about its constitutionality under the separation of powers doctrine.⁷ Witnesses at my Rules Enabling Act hearings argued persuasively that supersession would squarely conflict with the rationale of the Supreme Court's decision in INS v. Chadha. 462 U.S. 919 (1983).⁸ Chadha establishes that:

"Amendment and repeal of statutes, no less than enactment, must conform with Article I:"⁹

"There is no provision allowing Congress to repeal or amend laws by means other than legislative means

6. This view is shared by Judge Weinstein, Professor Lesnick, and Dean Cramton. See W. Brown, Federal Rulemaking: Problems and Possibilities 101 (1981) (hereinafter cited as "W. Brown").

7. See Prepared Statement of Stephen B. Burbank on H.R. 2633, submitted to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary at 5, and n.16 and materials cited therein. (hereinafter cited as "Statement of Prof. Burbank"). This view was expressed as early as 1914. See Hearings on ABA Bills Before the House Committee on the Judiciary, 63d Cong., 2d Sess. 29, 30. (statement of Senator Root) and 36-38 (comments of Rep. Floyd) (1914). See also, e.g., 3764 U.S. 865 (Black and Douglas, JJ., dissenting from Order of Jan. 21, 1963)

8. Rules Enabling Act; Hearings on Rules Enabling Act before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 98th Congress, 1st and 2d Sess. 134 (1984) (statement of Burt Neuborne, Legal Director, ACLU; See also Statement of Prof. Burbank at 5.

9. 462 U.S. at 954

Judge Edward Thaxter Gignoux
August 7, 1985

pursuant to Article I;¹⁰ and

"The explicit prescription for legislative action contained in Article I cannot be amended by legislation."¹¹

Thus, it would seem that repeal of a statute must conform with Article I. Supersession of a statute by a rule does not conform with Article I.

The constitutionality of a supersession clause undoubtedly would be challenged, and the rulemaking process would be paralyzed until such litigation was resolved. Hence, in my mind, retaining the supersession clause would be unwise, unnecessary, unconstitutional and impractical. The Criminal Justice Subcommittee, whose experience with the rulemaking process is longstanding, recently expressed similar views in its report on proposed amendments to the Federal Rules of Civil and Criminal Procedure.

The other provision I wish to mention requires that the Supreme Court submit to Congress suggested statutory amendments necessitated by a proposed rule change. Your letter questions the constitutionality of this provision, suggesting that such submissions would be unconstitutional "advisory opinions". It would follow from this, however, that the Supreme Court implicitly renders such opinions

10. Id. at 954 n. 18

11. Id. at 958 n. 23

Judge Edward Thaxter Gignoux
August 7, 1985

whenever it prescribes rules, since the Court must conclude that the rules do not "abridge, enlarge or modify any substantive rights", relating to practice and procedure, and are constitutional.¹² Thus, the logical conclusion of your argument would be that the Supreme Court cannot promulgate rules.

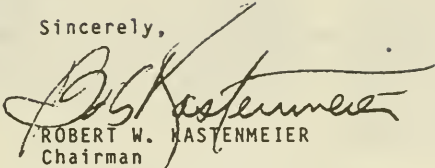
The Judicial Conference regularly sends legislative proposals to Congress. Perhaps the Judicial Conference, and not the Supreme Court, could be given the responsibility to submit any statutory amendments mandated by a rule change.

Finally, your assistance to my Subcommittee has been most helpful, and the Conference is fortunate to have someone of your energy and dedication representing it. I have attempted to accommodate the Conference's concerns with the rules enabling legislation. I would hope that you will give my views careful consideration so that the Subcommittee can move forward with this bill in a spirit of cooperation with the Conference. I look forward to working with you.

12. Cf. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) ("When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the enabling Act nor constitutional restrictions.") (Footnote Omitted)

Judge Edward Thaxter Gignoux
August 7, 1985

Sincerely,

A handwritten signature in cursive script, appearing to read "R. W. Hastenmeier". The signature is written in dark ink and is positioned above the typed name.

ROBERT W. HASTENMEIER
Chairman
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:dbv

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September 16, 1985

Honorable Warren E. Burger
Chief Justice of the United States
United States Supreme Court
Washington, D.C. 20543

Dear Mr. Chief Justice:

The Subcommittee on Criminal Justice, as you may know, has had extensive experience with the Rules Enabling Acts, beginning in 1973 with the Federal Rules of Evidence. Most recently, the Subcommittee had under consideration amendments to the Federal Rules of Civil and Criminal Procedure that were promulgated last April 30. As a result of its inquiry into those amendments, the Subcommittee decided not to recommend legislation to modify or delay the effective date of the amendments and issued the enclosed report.

I understand that this week the Judicial Conference will discuss H.R. 2633, Representative Bob Kastenmeier's bill to revise the Rules Enabling Acts, and in particular will take up the supersession clause. The Subcommittee, for reasons set forth at pages 17-18 of the report, believes that the clause should not be carried forward. You may wish to bring this portion of the report to the attention of the Judicial Conference.

On behalf of the Subcommittee, I call your attention to the comments in the report concerning the Chairman of the Standing Committee on Rules of Practice and Procedure, Judge Edward T.

Honorable Warren E. Burger

Page 2

Gignoux. Judge Gignoux has been helpful to the Subcommittee, and he has done a fine job in developing and overseeing the implementation of the formal procedures now being followed by the Standing Committee and the Advisory Committees. The Subcommittee is most appreciative of his assistance.

Sincerely,

A handwritten signature in cursive script that reads "John Conyers". The signature is written in dark ink and is positioned above the typed name.

John Conyers, Jr.
Chairman
Subcommittee on Criminal Justice

Enclosure

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

EDWARD T. GIGNOUX
CHAIRMAN

September 24, 1985

CHAIRMAN OF ADVISORY COMMITTEES SFD 3
PIERCE LIVELY
APPELLATE RULES
FRANK M. JOHNSON, JR.
CIVIL RULES
FREDERICK B. LACEY
CRIMINAL RULES
MOREY L. SEAR
BANKRUPTCY RULES

JOSEPH F. SPANIOLO, JR.
SECRETARY

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Committee on the Judiciary
United States House of Representatives
2232 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

With further reference to my letter of July 11, 1985, submitting a Prepared Statement setting forth my views, as Chairman of the Judicial Conference Standing Committee on Rules of Practice and Procedure, on the provisions of H.R. 2633, 99th Congress, the bill to amend the Rules Enabling Acts, I am pleased to report that at the semiannual meeting of the Judicial Conference on Wednesday, September 18, 1985, the Conference endorsed the views expressed in my Statement. The members of the Standing Committee had approved the Statement before it was presented to the Conference.

In response to your thoughtful letter of August 7 expressing the hope that the Standing Committee and the Conference would reassess some of the views stated in my letter, I am also pleased to report that the Conference authorized me to advise you as follows:

(1) The Conference does not object to the failure of H.R. 2633 to carry forward the supersession clause in the present Rules Enabling Acts, which states that "all laws in conflict with any such rules shall be of no further force or effect after such rules have taken effect." The Conference defers to your view that the supersession clause is probably unnecessary since the Judicial Code of 1948 eliminated the numerous federal procedural statutes which were the principal reason for the clause. The Conference also is persuaded that it would be unwise to invite litigation challenging the rulemaking process by those who question the constitutionality of a supersession clause under the Separation of Powers doctrine.

(2) The Conference has no objection to your suggestion that the Judicial Conference, rather than the Supreme Court, be given the responsibility to submit to Congress any suggested statutory amendments necessitated by a proposed rule change. As you point out, the Judicial Conference regularly sends legislative proposals to Congress. Vesting this responsibility in the Conference would

Hon. Robert W. Kastenmeier--2

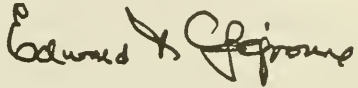
September 24, 1985

remove the question of whether such submissions by the Supreme Court would be unconstitutional "advisory opinions."

On behalf of the Standing Committee and the Judicial Conference, may I say that we appreciate your courtesy in offering us the opportunity to comment on this bill. We stand ready to assist you and your staff in the drafting of any legislation you may propose for modification of the Rules Enabling Acts. It is a privilege and a great personal pleasure to work with you in this important endeavor.

With best personal wishes.

Sincerely,

A handwritten signature in dark ink, appearing to read "Edmund S. Griffin". The signature is written in a cursive, somewhat stylized hand.

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON OFFICE

122 Maryland Avenue NE
Washington, DC 20002

September 26, 1985

National Headquarters
132 West 43rd Street
New York, NY 10036
(212) 544-5800Norman Dorsen
PRESIDENTIra Glasser
EXECUTIVE DIRECTOREleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties, and the
Administration of Justice
United States House of Representatives
2137-B Rayburn House Office Building
Washington, D.C. 20515

Attn: David Beier

Re: H.R. 2633, the Rules Enabling Act of 1985

Dear Representative Kastenmeier:

The ACLU, through Legal Director Burt Neuborne, testified on an earlier version of the proposed legislation, H.R. 4144, 98th Cong., 1st Sess. See Rules Enabling Act, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess. 130-53 (1983 & 1984). Subsequent to those hearings, you introduced a revised bill, H.R. 2633, 99th Cong., 1st Sess., which in turn has been the subject in the past few months of additional testimony, comments, and correspondence.

In addition to the matters we discussed in our earlier testimony, we have serious concerns about several provisions in H.R. 2633, and also about several matters which are not but should be addressed in H.R. 2633. Since we now understand that you may not be holding additional hearings on H.R. 2633, we are taking this opportunity to address our concerns.

As will become apparent, we address in the following comments only § 2 of H.R. 2633 (the proposed amendments to 28 U.S.C. § 2072 and § 2073). We, however, do support the other sections of the bill.

1. Your earlier bill, H.R. 4144, would have vested rule making power in the Judicial Conference; whereas H.R. 2633 would vest that power in the Supreme Court, where it resides at least in name under current law. We are firmly of the view that rule making power should not be vested in the Supreme Court. We are aware of the argument that the imprimatur of the Supreme Court makes the federal rules more likely to be followed by the lower federal courts and more likely to be used as models for state

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September 26, 1985
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court rules, but we disagree that these effects would necessarily follow, and we in any event believe that this argument and others are strongly outweighed by the appearance if not reality of unfairness and injustice. The Supreme Court simply should not be promulgating rules which it later sits in judgment of. We thus urge that the rule making power be vested in some other body, such as the Judicial Conference as you initially proposed in H.R. 4144.

2. H.R. 2633 correctly provides that the federal rules shall not "supersede any provision of a law of the United States." Since federal rules not enacted by Congress are not laws, we strongly endorse this supercession clause and urge that it be retained. As other commentators have pointed out, the historical reasons for the contrary provisions in current law no longer pertain. Moreover, as is made clear in I.N.S. v. Chadha, 462 U.S. 913, 954 (1983), it is Congress' role to repeal statutes or render them ineffective in conformance with Art. I of the Constitution. We thus fully support the supercession clause in H.R. 2633.✓

3. We endorse those provisions of H.R. 2633 which would require the Judicial Conference to prescribe and publish procedures for the consideration of proposed rules, which would authorize the Judicial Conference to appoint advisory committees consisting of a balanced cross section of bench and bar (a balance which we submit has not been achieved to date), and which would require the Judicial Conference to appoint a standing committee. We believe, however, that the terms of membership on the advisory committees should be both fixed and of limited duration. H.R. 4144 prescribed five year terms with service limited to ten years. We support this approach, particularly in view of the many members of the bench and bar who possess considerable procedural expertise. To the extent that a service limitation may prevent continuity at possibly crucial times, as some commentators have argued, we suggest that this problem could be dealt with through a provision authorizing staggered terms and allowing reappointments or extensions for up to two additional years in extraordinary circumstances.

4. We support the provisions of H.R. 2633 which would require notice and would ordinarily require open meetings, but we are troubled by the provision which would allow committees to close meetings whenever they deem it to be "in the public interest." Our concern here is not particularly with regard to

1. We recognize that the supercession clause may create a problem concerning future amendments of federal rules which have been enacted by Congress. We believe, however, that this problem could be alleviated through a two-tier approach for rules and statutes, as recently suggested by the Subcommittee on Criminal Justice of the House Committee on the Judiciary. See H.R. Rep. No. 2, 99th Cong., 1st Sess. 18 n.98 (1985).

Honorable Robert W. Kastenmeier
September 26, 1985
Page 3

early meetings concerning proposals or drafting, but instead with regard to post-hearing meetings where rules are voted on or where the language of a proposed rule, of a note, or of a report is discussed. It is these latter meetings which should always be open. We thus suggest that H.R. 2633 would be markedly improved by a provision requiring such post-hearing meetings to be open, or at least imposing a strong presumption against the closing of such meetings.

5. We fully support the provision in H.R. 2633 which would require a recommended rule change to be accompanied by the proposed rule, an explanatory note, and a written report. This provision can only enhance the proper interpretation and application of the rules.

6. As to the layover time allowed to Congress, we note that H.R. 2633 proposes a seven-month layover, whereas H.R. 4144 proposed a nine-month layover. Because we believe Congress' involvement in the rule making process is important, and because the actual layover time is shortened considerably by Congress' holiday recesses particularly in election years, we believe that a longer layover better facilitates Congress' review.

7. We object to the provision in H.R. 2633 which would authorize the Supreme Court, or in our view the Judicial Conference, simply to "fix the extent such rule shall apply to proceedings then pending." We would prefer instead a new provision in H.R. 2633 modeled on the effective date language commonly used by the rulemakers as reflected in Rule 86 of the Fed. R. Civ. P., i.e., that the new rules "govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies."

8. We agree with the provision in H.R. 2633 which would require the Supreme Court -- although we would prefer the Judicial Conference -- to transmit to Congress along with any proposed rule a statement of which federal statutes may be affected by or even in conflict with a proposed rule. In the latter situation, we urge that H.R. 2633 make absolutely clear -- as it currently does not -- that no such proposed rule could take effect unless Congress affirmatively amended any such conflicting statute. To the extent that this transmittal provision might impermissibly involve the Supreme Court in rendering advisory opinions, as some commentators have argued, we suggest that a proper response would be for H.R. 2633 to assign this transmittal function to the Judicial Conference. A better response, as we stated in our first comment, would be for H.R. 2633 to vest rule making power in the Judicial Conference.

Many of the foregoing concerns may be viewed as relatively

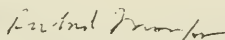
Honorable Robert W. Kastenmeier
September 26, 1985
Page 4

minor or technical, but we nonetheless hope our views will be considered. Most important of our concerns are the first two, reflected in our first two comments: pertaining to (1) vesting the rule making authority in the Judicial Conference, and (2) retaining the supercession clause. We hope our views as to these important matters also will be given consideration.

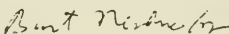
If you have any questions about any of our concerns addressed in this letter, we would be pleased to meet with you at your convenience so that we could further explain our views as well as exchange ideas.

Thank you for your consideration and for your leadership on this important subject.

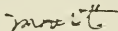
Sincerely,



E. Richard Larson
National Staff Counsel



Burt Neuborne
Legal Director



Morton Halperin
Director, Washington Office

ERL:ln

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

September 20, 1985

David Beier, Esq.
House Judiciary Committee
2137B Rayburn House Office Building
Washington, D.C. 20315

Dear David:

Thank you for sending me a copy of Phillip Brady's letter stating the views of the Department of Justice on H.R. 2633. As you know, I share the Department's reservations about the open meeting provision, although not the concern about procedural challenges, which are addressed in the bill. I am aware, however, that that issue is invested with a substantial political component.

As to the Department's views on supersession, a few observations are in order. First, the difficulty arising from, e.g., the Federal Rules of Evidence, is one that you have already noted and that could be dealt with by an amendment to the bill. I address the constitutional problems with such an amendment below. Second, although asserting that "the judicial branch should retain its current flexibility," Mr. Brady nowhere addresses the costs of the current system. One of these costs is the additional pressure that supersession puts on Congress to block proposed Federal Rules. Third, Mr. Brady does not identify the benefits of supersession provisions. Considering the reasons for their inclusion in the enabling acts and the history since that time, including in particular the 1948 revision of the Judicial Code, it is not clear what those benefits are.

Finally, I note that the Department has picked up and attempted to run with a line of analysis suggested in my June 6 statement before Representative Kastenmeier's subcommittee ("Does Chadha foreclose Congress from ceding, as part of an otherwise valid delegation, its supremacy in an area of shared power (retaining all the while the power to reassert it)?"). Mr. Brady's letter, however, makes me no more confident of the answer to that question than I was in June. For, it is not clear that he distinguishes judicial power that is inherent in the sense that the courts can act in the absence of legislative authorization and power to act in contravention of legislation. And it is quite clear that he follows many others in failing to distinguish among rulemaking in the context of a case or controversy, local court rulemaking and supervisory court rulemaking.

I believe that federal courts have inherent power both to fashion rules of procedure for a case or controversy and to regulate their proceedings prospectively by local court rules. It has never been necessary to test the latter proposition, because there have been federal statutes so authorizing since the beginning of the Republic. This power is not, however, inherent in the sense that its exercise trumps contrary legislation. Federal statutes

have long required that local court rules be consistent with federal statutes (see now 28 U.S.C. Section 2071), and to my knowledge the Court has never questioned Congress' power to impose that requirement. Indeed, it has reaffirmed the requirement, notwithstanding its absence in Fed.R.Civ.P. 83. See Colgrove v. Battin, 413 U.S. 149, 161 n.18 (1973).

It is harder to maintain that the Supreme Court, whatever its supervisory power in the context of a case or controversy, has inherent power to fashion rules regulating the practice and procedure of the lower federal courts prospectively (supervisory court rules). Again, it has never been necessary to answer the question, because the Court has had statutory authority when it has acted. In any event, I deem it inconceivable that, if the Court does have inherent power in this context, it is power to proceed contrary to legislative direction. See Burbank, "Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power," 11 Hofstra L. Rev. 997, 1004-1006; Burbank, "The Rules Enabling Act of 1934," 130 U. Pa. L. Rev. 1015, 1021 n.19, 1115 n.455, 1183 n. 728 (1982).

Even assuming the Court's power to prescribe supervisory court rules in the absence of legislative authorization (inherent power of the weaker type), I think the Department's analysis may be too facile. I am not referring to the debater's point about repeal vs. supersession. Rather, the fact is that Congress does enter the field, according to the requirements of Article I, when it passes statutes. Functionally viewed, general supersession provisions represent not "forbearance or deference...to the judiciary's inherent authority" but a general attempt by Congress to turn power that is inherent in one sense into power that is inherent in another. I am by no means sure that Congress is free to do that.

I am somewhat more sanguine about the constitutional validity of specific supersession provisions, such as the authorization to prescribe amendments to the Federal Rules of Evidence (which an amendment to H.R. 2633 might seek to preserve). Let us forget about "inherent power." Does Congress have the power to establish temporary rules in a statute and to provide for their supersession upon the promulgation of rules prescribed by the Supreme Court (or some other delegate) under a delegation that is otherwise valid? I should think so. Moreover, I should think that Congress could provide for supersession retrospectively so long as it identified the rules that, under this analysis, are "temporary." In both cases the repeal could, without too much strain, be attributed to Congress, acting in accordance with Article I.

From this perspective, the problem with general supersession provisions is that, not only did the Congress that passed the statute putatively superseded not focus on the issue, but no Congress has. This distinction emerges from the debate that attended the insertion of the supersession provision in the bill that became the Rules Enabling Act of 1934. See

Burbank, "The Rules Enabling Act of 1934," 130 U. Pa. L. Rev. 1015, 1050-54 (1982). It may not be a sufficient answer that the limits on the delegation in that statute serve much the same purpose as congressional specification, with the result that only "procedural" statutory provisions are superseded. All legal rules represent adjustments of competing policies. Under the current interpretation of the Enabling Act, it is possible for the Court to promulgate a valid Federal Rule that reflects a choice of "procedural" over "substantive" policies. That Rule supersedes a pre-existing statute with which it is inconsistent even though Congress made precisely the opposite policy choice. This, I take it, is the general problem that led Representative Kastenmeier to state, in connection with proposals to amend Rule 68, "Congress confirmed a substantive right by enacting the Civil Rights Attorney Fee Award Act." 130 Cong. Rec. 4105 n.3 (daily ed. Oct. 1, 1984). Unfortunately, the Court's decisions do not suggest agreement with his view of the Enabling Act's limitations.

In light of the Department's failure to address most of the practical considerations relevant to a policy decision about supersession and its failure to dispel constitutional doubts, I would urge that H.R. 2633 not be changed in this aspect.

Sincerely,



Stephen B. Burbank

SBB/vt

COLUMBIA LAW REVIEW

Vol. 76

OCTOBER 1976

No. 6

REFORM OF FEDERAL COURT RULEMAKING PROCEDURES*

JACK B. WEINSTEIN**

INTRODUCTION

The subject of this study is court control of court practice and related matters through court-promulgated rules. Rulemaking¹ powers are being exercised increasingly by national, state and local courts. Court rules have much the same form and effect as legislative enactments: they control all litigation falling within their ambit; they are subject to interpretation; and they may be declared invalid if found to be unconstitutional, or in conflict with legislation. In most instances the legislature has power to amend or reject rules adopted by a court.² In other instances rules adopted by a court or judicial body form an amalgam with statutory provisions adopted by the legislature.³

* This Article is based on a series of lectures delivered at the Law School of Ohio State University in the Spring of 1976. The ground covered in the Article will be developed in more detail in a book by the author to be published by the Ohio University Press in 1977. The author is grateful for the assistance of William Bonvillian of the Connecticut and Washington, D.C., bars. Denise Cote and Keith Secular, both of the New York bar, have assisted in gathering material and have made editorial suggestions.

** Adjunct Professor, Columbia University School of Law. United States District Judge, Eastern District of New York. B.A., Brooklyn College, 1943; LL.B., Columbia University, 1948.

1. "Rulemaking" is sometimes used to refer to significant reformulation of decisional law. See G. HAZARD, REPRESENTATION IN RULE MAKING IN LAW AND THE AMERICAN FUTURE 85 (M.L. Schwartz ed. 1976). As Professor Hazard uses the term, rulemaking includes

- the procedures used by courts and agencies performing adjudicative functions in adopting rules of procedure and rules governing their own internal administration;
- the procedures used by appellate courts when they contemplate significant reformulation of decisional law.

Id. at 87. The term is not used in that sense in this Article.

The problem of administrative rulemaking as opposed to adjudication is not discussed in this Article. For a discussion of this problem see the panel discussion at the Federal Bar Convention described in 45 U.S.L.W. 2159, 2163 (9/28/76):

2. The Federal Rules of Civil and of Criminal Procedure and the Federal Rules of Evidence are typical of this subjugation of court rulemaking to legislative control. New Jersey's highest court was almost unique in claiming that its power to adopt rules is not subject to legislative control; but that court has been forced to compromise this position. See notes 117-21 and 127-38 and accompanying text *infra*.

3. The New York Civil Practice Law and Rules, for example, includes provisions adopted and modified by the legislature as well as those adopted by the New York State Judicial Conference subject to legislative veto or change. See N.Y. CIV. PRAC. LAW & R. § 102 (M. Bender Civ. Prac. Ann. 1975); N.Y. JUD. LAW § 229(3) (McKinney 1968).

Each individual federal court is also generally empowered to adopt rules affecting its own practice. At the local level, court rules have been adopted by each of the federal district courts⁴ and by each one of the circuit courts of appeals;⁵ state courts have adopted similar local rules.⁶

Particularly at the federal level, the process of court rulemaking has worked fairly well: rules of evidence and rules for civil, criminal, bankruptcy and admiralty cases at both trial and appellate levels have been adopted and are generally acknowledged to be sound. The process, however, presents not only advantages but serious dangers. Some disturbing issues have arisen and substantial changes should now be considered. While this Article places primary emphasis on the national court system, considerable attention is given to the experience of the states because in rulemaking, as elsewhere, state courts provide effective laboratories for testing new approaches.⁷

The central thesis of this Article is that no pure theoretical source of rulemaking power exists. The taproot of rulemaking power in this country is legislative delegation, though there is also nourishment from the inherent role of a constitutionally independent judiciary. Consequently, when courts exercise rulemaking powers they should do so in general consonance with theories of delegation.

After a brief introduction, the Article examines the evolution of judicial independence from the twin theories of separation of powers and judicial review; it then explores the argument that the power of courts to make their own procedural rules is an integral aspect of judicial independence. From both an historical and practical perspective, it is concluded, however, that a delegation theory best achieves the practical balance between the legislative and judicial branches necessary for effective utilization of the rulemaking power. States where this balance has been tipped toward judicial control of rulemaking have ensnared themselves in unnecessary difficulties and unseemly conflicts between courts and legislatures.

4. FEDERAL LOCAL COURT RULES (H. Fischer & J. Willis eds. 1972) is a collection in loose leaf form of civil and general local rules. There is no national collection of criminal rules. 5. 28 U.S.C.A., UNITED STATES COURTS OF APPEALS RULES (1969).

6. See, e.g., rules for various New York courts collected in 1975-76 CIV. PRAC. ANN. OF N.Y. (M. Bender 1975).

7. For bibliographies on the subject and summaries of rulemaking in United States jurisdictions, see ABA, COMM. ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION 76 (1974); F.J. KLEIN, JUDICIAL ADMINISTRATION AND THE LEGAL PROFESSION 290 *et seq.* (1963) (an invaluable book which will appear in a new edition in 1976); STUDY OF RULE-MAKING POWER, THIRD PRELIMINARY REPORT OF [N.Y.] ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE (1959); Ashman, *Measuring the Judicial Rule-Making Power*, 59 J. AM. JUD. SOC'Y 215 (1975) (summary of the excellent studies of the American Judicature Society); Blau & Clark, *Sources of Rules of State Courts*, 66 LAW LIB. J. 37 (1973); Annot., 158 A.L.R. 705 (1945); Annot., 110 A.L.R. 22 (1937); American Judicature Society, *Uses of the Judicial Rule-Making Power* (1974) (mimeograph); American Judicature Society, *The Judicial Rule-Making Power in State Court Systems* (October, 1967) (mimeograph); J.A. Parness & C.A. Korbakes, *A Study of the Procedural Rule-Making Power in the United States 68-76* (August, 1973) (mimeograph); C. Sherr, *Bibliography—Rule-Making Power of the Courts (1928-1955)* (1955) (unpublished bibliography on file at the Columbia Law School Library).

The remainder of the Article discusses reforms necessary for a more effective and less abrasive exercise of the rulemaking power including greater public deliberation and participation in the development of rules, the replacement of the Supreme Court by the Judicial Conference as the rulemaking body, limitation of congressional review of proposed rules to broad principles and outlines, and court restraint in initiating important substantive and jurisdictional changes through rulemaking. Comparable reforms are suggested in the areas of local court rules and individual judge's rules.

A. Rulemaking as Legislation

In certain respects, rulemaking by federal courts resembles a legislative rather than a judicial process. The departure from usual adjudicative patterns is most clearly exemplified by the absence of a controversy: at the level of national federal rulemaking, the Supreme Court lays down general standards applicable to all future cases without the aid of individual fact situations and adversary argument.⁸ In rulemaking, the Court's legislative pronouncements are reviewed by Congress—a reversal of the usual practice under which congressional legislation is measured and interpreted by the courts in the light of constitutional and other requirements. In normal adjudications the Court's power is based upon the Constitution, although that power is limited by jurisdictional, venue and other provisions enacted by Congress. The Court's power to make rules, in contrast, was granted by Congress under specific limitations; having accepted that grant for many years, it is doubtful that the Court could claim inherent power if general rulemaking power were circumscribed.

Judicial rulemaking is further distinguished from adjudication by the absence of traditional limitations on its exercise. Where a court utilizes a case before it as an opportunity to pronounce broad principles and detailed regulations,⁹ it is subject to the restrictions imposed by *stare decisis*.¹⁰ Further constraints on judicial legislation are provided by the requirement that the controversy before the court be concrete, by the adversary nature of the proceeding, and by the need of the court to justify its decision by a reasoned opinion.¹¹ Moreover, the possibility exists of relatively easy mod-

8. [E]ach Justice studies those rules. He is not given the benefit of any adversary report. . . . In the conference of the Court, a vote is taken as to whether the rule shall be submitted to Congress.

*Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws, House Comm. on the Judiciary, 93d Cong., 1st Sess. 145 (1973) (testimony of Justice Arthur J. Goldberg) [hereinafter cited as *Evidence Hearings*].*

9. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

10. *But see* Address by Judge Lumbard, Conference of Chief Justices in Honolulu (August 3, 1967). Judge Lumbard criticized *Miranda v. Arizona*, 384 U.S. 436 (1966), on the ground that the matter should have been treated by rulemaking, particularly since the American Law Institute was considering the matter as part of its work on pre-arraignment procedures.

11. *But cf.* Vorenberg, *A.L.I. Approves Model Code of Pre-Arrestment Procedure*, 61 A.B.A.J. 1212, 1213 (1975) (suggesting that in promulgating rules for interrogation in *Miranda*

ification through future interpretations and legislation.¹²

In the normal legislative process, there are equivalent safeguards promoting a reasoned determination acceptable to the public: the legislation must be publicly introduced; it is considered by committees; fact-finding research may be undertaken;¹³ the views of the public are heard through representatives of pressure groups; and hypothetical and actual situations and precedents are tested against the draft to rectify careless articulation of the legislative standard. More generally, the varied backgrounds and regional interests of legislators normally exert a balancing effect on the final product; the prospect of answering to voters at election time encourages legislators to act with care. Finally, before the bill is approved, the public has the opportunity to place pressure on the executive. These are all very real protections in a democratic system.

The court rulemaking process is not subject to similar safeguards. Most of the discussion and decisionmaking takes place privately, so that the public may first become aware of a rule upon its publication after adoption. This is particularly true of local rules,¹⁴ which may involve such important matters as jury size, sentencing policy, permissibility of class actions, freedom of the press to publicize cases, and admission to the bar. Sometimes, as in the case of guidelines issued by higher courts, there is no publication even after adoption.¹⁵

Generally, the United States Supreme Court has adopted rules in a manner which affords considerable protection to the public: proposals are published by the Advisory Committee considering them; opportunity is then given to the public to comment; the Advisory Committee publishes revised drafts; the Standing Committee on Federal Rules of Practice and Procedure of the United States Judicial Conference reviews the proposals and makes changes; the United States Judicial Conference forwards them to the Supreme Court; the Court then adopts, modifies or rejects the proposals; and, finally, Congress has an opportunity to pass upon them. Within the last few years Congress has taken a more vigorous interest in national rules than in the past; it has made major modifications in the Federal Rules of Evidence and in the amendments to the Federal Rules of Criminal Procedure.¹⁶ Nevertheless, the deliberations of the Advisory

v. Arizona, 384 U.S. 436 (1966), the Court went far beyond the facts and overstepped proper judicial function). See also *Mildner v. Gulotta*, 405 F. Supp. 182, 201 (E.D.N.Y. 1975) (Weinstein, J., dissenting), *aff'd*, 425 U.S. 901 (1976). The dissent was based on minimum standards of right to be heard and to obtain a reasoned opinion in court cases.

12. Change becomes awkward, however, when a decision is grounded upon constitutional imperatives. See generally Monaghan, *The Supreme Court 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

13. See Linde, *Due Process of Law Making*, 55 NEB. L. REV. 197, 223-24 (1976).

14. See text at notes 241-43 *infra*. See generally note 4 *supra*.

15. See, e.g., text at note 307 *infra*.

16. See generally Hungate, *Changes in the Federal Rules of Criminal Procedure*, 61 A.B.A.J. 1203 (1975).

Committee, which makes the basic decisions, are private.¹⁷ It holds no public hearings, and while it does receive written communications, its membership and method of organization may make it particularly susceptible to the views of the courts, groups represented by its members and governmental bodies. Appointment of members by the Chief Justice gives him a great deal of direct and indirect influence on the Committee's decisions.

B. *Advantages of Rulemaking in Meeting Growing Pressures on the Courts*

The present wide-ranging role of courts in the social, economic, technical and political affairs of this country is a relatively recent development. When the Republic was in its infancy, it was generally agreed that common—that is, non-statutory—law, whether procedural or substantive, should develop by accretion through decision in individual cases. Dicta were, of course, not unknown and the courts were clearly aware of the prospective nature of their rulings in individual cases and of the impact of stare decisis on the law. The courts adhered fairly strictly, however, to the concept of separation of powers; at the federal level at least, they refused to render advisory opinions.¹⁸

This restrictive model of the courts' role began to break down early in this century. Antitrust cases requiring the courts to make national economic policy were a harbinger of a new approach. So, too, was the so-called "Brandeis brief," which recognized explicitly that substantive social policy was being developed by the courts.¹⁹ Cases involving attacks on broad state legislative schemes—such as the public welfare cases of the twenties and thirties—were accepted. Congress modified substantive rights in ways that required the courts to resolve individual disputes involving large groups of persons and entities.²⁰

17. Much of the information and conclusions in this Article is based upon the author's experiences as a member of the Federal Advisory Committee on Rules of Evidence, various committees of the United States Judicial Conference, the Second Circuit, the District Court for the Eastern District of New York, bar associations, and New York State legislative and judicial committees and commissions.

18. See text accompanying notes 50-55 *infra*. This is not to say that there were no departures from this doctrine. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896); *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

19. See J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶¶ 200[03]-[04] (1975); Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 HARV. L. REV. 692 (1948). Cf. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1289-1304 (1976) (illustrating the procedural reforms of the litigation process which have resulted from the social aspects of the judicial function).

20. Chief Justice Burger has commented:

The tendency of Americans to try to resolve every sort of problem in the courts continues. Overwhelmed by increased demands for regulatory legislation, for broadened governmental programs of all kinds, Congress enacts legislation much of which reaches the courts for resolution.

Chief Justice Burger Issues Yearend Report, 62 A.B.A.J. 189 (1976).

Along with this broadening of the courts' role, heavy pressure from expanding concepts of due process—"individualized determination" as opposed to "categorical treatment"²¹—has increased the burdens of litigation.²² The possibility of requiring less than full-fledged evidentiary trials by shaping procedural due process rules to reduce "the risk of error inherent in the truth-finding process"²³ in specific classes of cases, has promised a decrease in the growth rate of administrative hearings, but not yet in that of judicial trials. This country's original emphasis on individual liberty and personal rights, recently reinforced by the specter of modern totalitarianism, has not abated; "individual decision making"²⁴ on a huge scale provides a continuing challenge to the judicial system.

These changes have resulted in steadily mounting caseloads. Understandably, courts have sought ways to handle disputes on a wholesale rather than an individual basis while avoiding too sharp a departure from prior concepts of the limitations on their roles.²⁵ Modern court rules reflect these moves toward efficiency. Much of the current environmental, consumer and securities litigation, for example, has been made possible by an expanded class action rule,²⁶ while free intervention rules²⁷ and more flexible procedures generally have broadened the scope of litigation. Transfer and consolidation rules and statutes for pretrial proceedings and trials in multi-district litigation have made national litigation easier.²⁸ The applicability of res judicata has been expanded so that disputes among many parties can be disposed of in one case.²⁹ Standing requirements have been relaxed,³⁰ mootness has been ignored³¹ and the significance of ripeness has

As one example, Title VII legislation covering discrimination in employment, 42 U.S.C. § 2000e-2 (1970), as amended, has given rise to a host of opinions relating to methods of testing and selecting municipal and private employees. See, e.g., *Albemarle v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); E.E.O.C. Guidelines, 29 C.F.R. § 1607 (1974).

21. *United States Department of Agriculture v. Murry*, 413 U.S. 508, 519 (1973) (Marshall, J., concurring).

22. See Tribe, *Structured Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975); Note, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to La Fleur*, 62 GEO. L.J. 1173 (1974).

23. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976).

24. *Crawford v. Cushman*, 531 F.2d 1114, 1125 (2d Cir. 1976).

25. See L. LUSKY, *BY WHAT RIGHT?* 302 (1975).

26. See generally *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1319 (1976). Class actions, however, have obviously made some of the appellate courts nervous. *Id.* at 1353. Cf. *Wallace v. Kern*, 499 F.2d 1345 (2d Cir. 1974) (wholesale relief for hundreds of prisoners held for excessive periods awaiting trial impermissible). See also Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299 (1973); *The Survey of New York Practice*, 50 ST. JOHN'S L. REV. 179, 189-96 (1975).

27. See, e.g., C. A. WRIGHT, *LAW OF FEDERAL COURTS* 328 (2d ed. 1970).

28. See 28 U.S.C. § 1407 (1970). A brief history of this legislation which created the Judicial Panel on Multidistrict Litigation is set forth in *Foreword, MANUAL FOR COMPLEX LITIGATION* xvii-xix (1973) which was prepared by a committee of federal judges in consultation with professors and members of the bar.

29. See, e.g., M. ROSENBERG, J. B. WEINSTEIN, H. SMIT & H. KORN, *ELEMENTS OF CIVIL PROCEDURE* ch. 15, § 4 (1976).

30. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1974); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (dictum); *Flast v. Cohen*, 392

declined.³² Prospective overruling has reduced the burden of retroactivity, and has allowed quantum jumps in the development of substantive and procedural rights.³³ Federal courts have asked state courts for advisory opinions,³⁴ and state courts have granted them with increasing frequency.³⁵

Techniques for efficient large-scale adjudication have also been developed extrajudicially. Organizations such as the N.A.A.C.P. Legal Defense Fund, the American Civil Liberties Union, and the Sierra Club are capable of orchestrating the development of an entire area of the law, such as desegregation of schools, capital punishment, abortion, the environment and the like.³⁶

The rulemaking power examined in this Article is consonant with these other developments. It extends the reach of judicial power by promoting judicial efficiency and by permitting a single decision—whether in a case or by a rule—to have a wider impact.

I. DEVELOPMENT OF NATIONAL RULEMAKING POWER

Procedures tend to be considered timeless by those who know no other system. Present methods of formulating national rules, unchanged for the past forty years, will be assumed by many to be writ in stone. A glance back over history is thus essential for understanding that options are available. Much of the section that follows seeks to demonstrate that there are no constitutional, theoretical or historical barriers to change.³⁷

U.S. 83 (1968). See also L. LUSKY, *supra* note 25, at 133; Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971). Limitation of the "political issue" doctrine has closed off, to some extent, another escape from federal court intervention. See, e.g., *Baker v. Carr*, 369 U.S. 186, 208-37 (1962).

31. See, e.g., *Rosenbluth v. Finkelstein*, 300 N.Y. 402, 404, 91 N.E.2d 581 (1950); Annot., 132 A.L.R. 1185 (1941).

32. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 113-18 (1976).

33. See, e.g., *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973), *rehearing as to remedy*, 67 N.J. 333, 339 A.2d 193 (1975); *Hicks v. New Mexico*, 88 N.M. 588, 544 P.2d 1153 (1976) (doctrine of immunity abolished for future cases only). See also L. LUSKY, *supra* note 25, at 76-79.

34. AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 292-96 (1969).

35. See, e.g., *Governor v. State Treasurer*, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated as improvident advisory opinion*, 390 Mich. 389, 212 N.W.2d 711 (1973). For an analysis of the use of advisory opinions in the states, see Comment, *The State Advisory Opinion in Perspective*, 44 FORDHAM L. REV. 81 (1975).

The Supreme Court has been reluctant to render advisory opinions. See, e.g., *United States v. Fruehauf*, 365 U.S. 146, 157 (1961), and cases cited therein; *Liberty-Warehouse Co. v. Grannis*, 273 U.S. 70 (1924). Cf. *Buckley v. Valeo*, 424 U.S. 1, 113-18 (1976) (finding of substantial controversy admitting specific relief through a decree of conclusive character distinguished the case from one requesting an advisory opinion and thus allowed the Court to render a decision). Not all legal scholars are opposed to having the Supreme Court render advisory opinions. See, e.g., Aumann, *The Supreme Court and the Advisory Opinion*, 4 OHIO ST. L.J. 21 (1937); Note, *Case for an Advisory Function in the Federal Judiciary*, 50 GEO. L.J. 785 (1962); Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV. 1302 (1956). But see Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

36. J. GREENBERG, *LITIGATION FOR SOCIAL CHANGE: METHODS, LIMITS AND ROLE IN DEMOCRACY* (1973).

37. The historical development of rulemaking powers will be treated much more exten-

The extent and nature of the rulemaking power of federal courts is inextricably interwoven with attitudes about the function of courts in relation to other branches of government and about the limits of judicial independence. The rulemaking power has, nevertheless, evolved through pragmatic choices which have largely ignored the dilemmas posed by the theoretical underpinnings of the judicial system.

A. *Evolution of an Independent Federal Judiciary*

The evolution of rulemaking power in the United States is intertwined with the relation of courts to other branches of government. The extent of judicial independence has a crucial bearing on the courts' role in rulemaking, since it could be argued that a truly independent court system should control its own procedural rules. In this country, the extent of judicial independence in the rulemaking area has been, to a considerable degree, a function of evolving doctrines of separation of powers and judicial review.

1. *State Courts in the Colonial and Post-Revolutionary Eras.* Insofar as colonial opinion focused on the separation of powers, it was concerned primarily with the division of authority between the executive and the legislative branches, rather than with the extent of judicial power vis-à-vis either of these branches. After the outbreak of the Revolution, all of the states—proceeding from English theory, enlightenment thinking, and colonial experience—enacted constitutions as fundamental laws that generally reflected separation of powers doctrines.³⁸ Distinctions between the judiciary and other branches, however, were occasionally blurred;³⁹ judicial separation remained imperfect. The courts did, nevertheless, continue to modify practice on a case-by-case basis without legislative intervention; and stare decisis gave individual rulings substantial impact. Courts and the bar were actively altering practice and procedure by interstitial changes to meet the needs of a new society.⁴⁰

sively and in greater depth in the author's forthcoming book. See note * *supra*. The book will also discuss rulemaking practice in Great Britain, a subject beyond the scope of this Article.

38. In New York, for example, draftsmen of the 1777 Constitution placed power to check the legislature in a Council of Revision rather than in the courts. The Council was empowered to reject "improper" legislation, and such legislation could not become effective unless two-thirds of each legislative house subsequently approved it. See I J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 103-04 (1971). A number of states made provision for an independent judiciary: Delaware, Maryland, Massachusetts, New Hampshire, New York and North Carolina enacted provisions protecting judges' tenure in office; Delaware, Massachusetts, New Hampshire, Pennsylvania, North Carolina, South Carolina, and Virginia insured judicial salaries against reduction. *Id.* at 98 n.9. In Virginia, John Marshall pressed for a judiciary independent of executive restraints. See L. BAKER, *JOHN MARSHALL, A LIFE IN LAW* 91 (1974).

39. Jefferson noted, for example, that on a number of occasions the Virginia Burgesses had decided controversies better left to judicial determination. 4 *THE WORKS OF THOMAS JEFFERSON, Notes on the State of Virginia* 21 (Fed. ed. P.L. Ford 1904-05). The executive branch in Pennsylvania usurped traditional judicial powers by committing persons to jail, setting bail, and interfering with civil litigation and habeas corpus proceedings. See I J. GOEBEL, JR., *supra* note 38 at 99 n.14 (1971). The Supreme Judicial Court's duty to render advisory opinions was a part of the Massachusetts Constitution. MASS. CONST. ch. 3, art. 2 (1780).

40. See, e.g., Nelson, *The Reform of Common Law Pleading in Massachusetts 1760-1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97 (1973).

2. *The Constitutional Period.*

a. *The Philadelphia Convention.* The concept of separation of powers, acquired either through reading of enlightenment theory or colonial experience, was "axiomatic in contemporary political thinking," and almost universally shared by the framers of the Constitution.⁴¹ Although this attitude governed the evolution of the articles on the legislative and executive branches, it was less clearly applied by the framers to the judiciary, largely because there were few precedents for truly separate and independent courts.

Convention consideration of a framework for the judicial branch focused initially on the "Virginia Plan," which proposed, *inter alia*, a system of independent federal courts, supreme and inferior, that was national in scope.⁴² Opposed to this scheme was the "Paterson Plan," a proposal which envisioned a supreme court of very limited jurisdiction and no inferior federal courts. The Virginia Plan was eventually adopted, although several elements of Paterson's plan and another similar formulation were retained.

At the close of the first debates on the judiciary, the delegates unanimously approved a resolution which stated that federal legislation would override any conflicting state laws, and that, as a result, the state judiciary would have to enforce this supremacy.⁴³ Judicial control over state enactments in conflict with federal laws provided a conceptual springboard to judicial control over congressional enactments conflicting with the Constitution. This final leap was in large part made in the final weeks of the convention during the debate over the Supremacy Clause.⁴⁴ Although only seventeen of the fifty-five delegates at the Convention stated that federal courts were empowered to pass on the constitutionality of congressional acts, this group was comprised of

fully three-fourths of the leaders of the Convention, four of the five members of the Committee of Detail which drafted the Constitution, and four of the five members of the Committees of Style which gave the Constitution final form. . . . [They were] men who expressed themselves on the subject of judicial review because they also expressed themselves on all other subjects before the Convention. They were the leaders of that body and its articulate members.⁴⁵

The Philadelphia Convention had conceived a judiciary of unprecedented power and independence. It might include a system of inferior courts as well as a Supreme Court; it was explicitly empowered to review

41. See 1 J. GOEBEL, JR., *supra* note 38, at 204.

42. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 955 (C.C. Tansill ed. 1927).

43. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (M. Farrand ed. 1966).

44. See 1 J. GOEBEL, JR., *supra* note 38, at 241.

45. E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 11-12 (1914).

actions of the state courts; and it was implicitly empowered to review the constitutionality of acts of Congress. Additional provisions protecting judges' salaries and tenure and establishing the dimensions of federal jurisdiction further emphasized the judiciary's autonomous power.

b. *The Federalist Papers*. The five Federalist Papers dealing with the Judiciary, Numbers 78 to 82, further stressed the themes of judicial independence and authority. Federalist Number 78 formed the conceptual heart of Hamilton's attitude toward the judiciary: "The complete independence of the courts of justice is peculiarly essential in a limited constitution."⁴⁶ Arguing for judicial review of legislation's constitutionality, he denied that such review made the courts more powerful than the legislature: "[w]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter rather than the former."⁴⁷ Because of this crucial role performed by the courts, Hamilton urged that their independence be carefully protected.

c. *State Ratification Debates*. State debates over the adoption of the Federal Constitution centered on antifederalist fears that centralized executive and legislative powers would operate to the detriment of the powers of states and the rights of individuals; they dealt only infrequently with the judicial branch.⁴⁸ Professor Main concludes:

[M]ost Antifederalists were satisfied with all or with the greater part of the judiciary article; the need for a national court system was nowhere challenged and most of its powers were accepted without question.⁴⁹

B. *Advisory Opinions*

The degree to which the independence and authority of the federal judiciary were taken for granted seemed to indicate that there would be minimal opposition to judicial rulemaking. But the courts themselves created doubt as to whether they could make rules outside the context of a particular lawsuit by defining doctrines such as the advisory opinion rule—if the courts' adjudicative power must be limited to a particular case or controversy, it might be argued that their rulemaking power must be similarly circumscribed. The development of the advisory opinion rule thus provides a useful model for exploring judicial independence and its relation to rulemaking after the adoption of the Constitution.

46. THE FEDERALIST NO. 78, at 491 (B. Wright ed. 1961) (A. Hamilton).

47. *Id.* at 492.

48. For a discussion of debates on Article III in the states, see I J. GOEBEL, JR., *supra* note 38, at 280-91.

49. J. T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, 158 (1961).

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In July, 1793, Thomas Jefferson, then Secretary of State, wrote a lengthy letter to Chief Justice John Jay and the Associate Justices of the Supreme Court seeking their advice.⁵⁰ On August 8, 1793, the Justices replied, refusing to give extra-judicial advice.⁵¹ The Justices placed the bar against rendering advisory opinions to other branches on the strongest conceptual ground: the constitutional requirement of separation of powers. Since judicial rulemaking also involves at its heart a question of the appropriate division of roles among the three branches, it is necessary to consider whether judicial rulemaking is at odds with the traditional reluctance of the courts to render advisory opinions.

One is led to conclude that rulemaking is only partially controlled by the advisory opinion doctrine. Like advisory opinions, rulemaking occurs outside the focus of a case or controversy. In a sense rulemaking raises the same separation of powers issue that is at the heart of the ban on advisory opinions, since rulemaking solely by courts would represent an infringement on legislative power to make general laws for the structure of all governmental processes, including those of the courts.

However, there has never been a fully compartmentalized separation of powers. As Justice Tom Clark has candidly observed, "[T]here is much commingling, intermingling, and meddling among the three branches of federal government."⁵² Chief Justice Burger has termed the view that the

50. The letter read in part:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. . . . The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties.

3 JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486 (1891), reprinted in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64 (2d ed. 1973) (emphasis in original) [hereinafter cited as HART & WECHSLER]. Earlier, the Chief Justice had rejected a request for support from Jefferson's political foe, Secretary of the Treasury Hamilton. See Dilliard, *Jol.n Jay*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 13-14 (L. Friedman & F. Israel eds. 1969).

51. The letter to President Washington read in part:

We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month. [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the executive departments.

3 JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488 (1891), reprinted in HART & WECHSLER, *supra* note 50, at 65-66 (emphasis in original).

52. Clark, *Separation of Powers*, 11 WILLAMETTE L.J. 1 (1974). See also Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 391 (1976) ("The branches of government were not designed to be at war with one another. The relationship was not to be

legislative and judicial branches should not talk to each other "a naive position not consistent with our constitutional system."⁵³ The Supreme Court similarly remarked in *Buckley v. Valeo*⁵⁴ that the draftsmen of the Constitution "saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." Judicial independence cannot be absolute. Against the background of this scheme of government the advisory opinion analogy is not sufficiently precise: the rulemaking power is more legislative than advisory and falls within that twilight area created by practical necessity where activities of the separate branches merge.⁵⁵

C. *Historical Origins of the Rulemaking Power of Federal Courts*

Without any express discussion of the theoretical separation of powers dilemma posed by the rulemaking power, both Congress and the courts adopted a purely pragmatic solution to the issue of who should control rulemaking. In the Judiciary Act of 1789⁵⁶ and the Process Acts of 1789,⁵⁷ 1792,⁵⁸ and 1793,⁵⁹ a delegation theory was implemented, under which Congress assumed ultimate authority but gave the courts substantial power to adopt rules within a broad procedural outline.

1. *The Judiciary Act of 1789.* Much of article III of the Constitution was not self-enacting, but simply provided authority for implementing legislation. The Judiciary Act of 1789⁶⁰ was the first example of this extensive legislation. Section 17 of the Act empowered the several federal courts to establish their own rules "for the orderly conducting [of] business." The Act itself limited the extent of the courts' discretion to make rules by detailing a number of basic procedural requirements, but, as a whole, it recognized that courts would play a crucial role in shaping the law through common law judicial decision. The Act's direction, for example, that all writs, including non-statutory writs, be issued in accord with "principles and usages of law," underlined the courts' inherent procedural and rulemaking powers. Similarly, the courts were authorized to make

an adversary one, though to think of it that way has become fashionable."); Address by Judge Henry Friendly, Bicentennial Lecture Series, Jan. 29, 1976.

53. U.S. NEWS & WORLD REPORT, March 31, 1975, at 28, col. 1. See also [1974] CAL. JUDICIAL COUNCIL, ANNUAL REP. TO GOVERNOR, ch. 1 (pointing out the need to restructure the California Council on Criminal Justice to permit the judiciary to participate in planning criminal justice programs).

54. 424 U.S. 1, 121 (1976).

55. Cf. Levi, *supra* note 52, at 372 (discussing the ambiguities of the separation of powers doctrine from a historical perspective).

56. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

57. Act of Sept. 29, 1789, ch. 21, 1 Stat. 93.

58. Act of May 8, 1792, ch. 36, 1 Stat. 275.

59. Act of March 2, 1793, ch. 22, 1 Stat. 333. The historical materials are collected in HART & WECHSLER, *supra* note 50, at 663. See also Goldberg, *The Supreme Court, Congress and the Rules of Evidence*, 5 SETON HALL L. REV. 667 (1974).

60. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

judgments "according as the right of the cause and matter in law shall appear unto them."⁶¹

Although in retrospect many of the Act's provisions seem a brilliant selective amalgam of varied state procedures, contemporary opinion was uneasy over some of the Act's imperfections. Madison, for example, hoped that the judges would subsequently reconsider and revise the Act.⁶² His view probably reflected a contemporary attitude that implied power to design court procedures rested in the courts as well as in Congress.

2. *The Process Acts*. "An Act to regulate Processes in the Courts of the United States"⁶³ emerged late in 1789 from the same committee and Congress that had brought forth the earlier Judiciary Act. Although the Process Act was intended to establish the forms of process in the federal courts, through its subsequent revisions it had an impact on the powers of courts to set rules. Congress undertook revision of the 1789 Process Act in 1792. The version of the bill which was eventually enacted provided that equity, common law, and admiralty proceedings were

subject . . . to such alterations and additions as the [federal] courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same. . . .⁶⁴

In 1793 the courts' rulemaking power was again considered. To a Senate bill concerning the structure of the circuit courts, the House added a section shifting the power to make rules for practice from federal courts as a whole to the Supreme Court alone. The Senate apparently considered this too great a departure from previous policy and changed the language of the section to place rulemaking power in "the several Courts of the United States."⁶⁵

The law enacted in 1793⁶⁶ continued the tendency of the 1792 Process Act to relax legislative control over rulemaking and to expand the courts' powers in that area. Although Congress retained the power to intervene to formulate rules of practice and procedure,⁶⁷ the practical authority to formulate rules had shifted to the courts.⁶⁸ In the following section, the development of particular sets of federal rules will be explored.

61. *Id.* § 32.

62. I J. GOEBEL, JR., *supra* note 38, at 508, (citing letter of Madison to Pendleton of Sept. 14, 1789, Ms. Madison Papers XII, 30 (Library of Congress)).

63. Act of Sept. 29, 1789, ch. 21, 1 Stat. 93.

64. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275.

65. Act of March 2, 1793, ch. 22, § 7, 1 Stat. 333.

66. *Id.*

67. The bill provided in part that "it shall be lawful for the several courts of the United States . . . to make rules . . . in a manner not repugnant to the laws of the United States." *Id.*

68. The placing of basic rulemaking power in the courts by the Process Act of 1793 was sweepingly reaffirmed in the Act of August 23, 1842, which provided:

That the Supreme Court shall have full power and authority, from time to time, to

D. *Evolution of Present Federal Procedural Rules*

Currently, the Supreme Court and the lower federal courts are given general authority to establish rules for the conduct of their own business by section 2071 of title 28 of the United States Code. The Supreme Court possesses specific authority to prescribe rules of procedure for lower federal courts in bankruptcy cases,⁶⁹ in other civil cases,⁷⁰ and in criminal cases,⁷¹ and to revise the rules of evidence.⁷² This statutory framework is relatively young.

1. *Federal Equity Rules.* Equity was formerly viewed as distinct from law. Because equity was largely undeveloped in the states, section 34 of the Judiciary Act of 1789⁷³ was not made applicable to federal equitable actions. As a result, equity procedure developed without substantial pressures to conform with state procedures, and the Supreme Court possessed considerable freedom in equity rulemaking.

The Court, however, waited to exercise its power until 1822, when it issued thirty-three equity rules.⁷⁴ In 1842, the Supreme Court issued a revised set of ninety-two equity rules.⁷⁵ Long after the 1842 rules had become obsolete, the Supreme Court undertook a systematic revision, culminating in the Equity Rules of 1912.⁷⁶ Finally, in 1938, law and equity were merged in the federal courts by the superseding Federal Rules of Civil Procedure.⁷⁷

2. *Admiralty Rules.* The Process Act of 1789⁷⁸ provided that admiralty proceedings should be conducted "according to the course of the civil

prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.

Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516. See also 13 Rev. Stat. §§ 913, 917, 918 (1878).

69. 28 U.S.C. § 2075 (1970).

70. 28 U.S.C. § 2072 (1970).

71. 18 U.S.C. §§ 3771, 3772 (1970).

72. 28 U.S.C. § 2076 (Supp. V, 1975).

73. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73. See text accompanying note 91 *infra*.

74. 20 U.S. (7 Wheat.) v (1822).

75. 42 U.S. (1 How.) xli (1842).

76. 226 U.S. 627 (1912).

77. For a discussion of the development of the Equity Rules, see HART & WECHSLER, *supra* note 50, at 664-65. See also Griswold & Mitchell, *The Narrative Record in Federal Equity Appeals*, 42 HARV. L. REV. 483 (1929); Lane, *Federal Equity Rules*, 35 HARV. L. REV. 276 (1922); Payne, *Counterclaims Under New Federal Equity Rule 30*, 10 VA. L. REV. 598 (1924); Talley, *The New and Old Federal Equity Rules Compared*, 18 VA. L. REV. 663 (1913) (discussing practice under old, pre-merger rules).

The merger of law and equity had begun to take place in the states ninety years earlier as a result of legislative, not court, initiative. See, e.g., J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 103.01.

78. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

law." With the Process Act of 1792, this stop-gap measure was replaced by a provision that admiralty proceedings were to be conducted "according to the principles, rules and usages which belong . . . to courts of admiralty. . . , as contradistinguished from courts of common law."⁷⁹

From 1792 until 1844, the Supreme Court failed to exercise its admiralty rulemaking power and left the field to conflicting rules developed by district courts. Finally, drawing impetus from the reaffirmation of the rulemaking power in the Act of August 23, 1842,⁸⁰ the Supreme Court issued forty-seven admiralty rules in 1844;⁸¹ these rules were not a comprehensive codification but were clarifications of, and additions to, traditional admiralty practice. In 1921 they were extensively revised.⁸² In 1966, admiralty procedure was merged with civil procedure;⁸³ the Federal Rules of Civil Procedure are now applicable to admiralty as well as civil cases.⁸⁴

3. *Bankruptcy Rules.* Article I, section 8 of the Constitution grants Congress the power "To establish . . . uniform laws on the subject of bankruptcies throughout the United States." Current bankruptcy laws are the product of an Act of July 1, 1898,⁸⁵ a major revision undertaken in 1938,⁸⁶ and approximately one hundred amendments to these acts.⁸⁷

Shortly after passage of the Act of July 1, 1898, the Supreme Court formulated rules for bankruptcy proceedings.⁸⁸ The rules were frequently amended and were systematically revised in 1939.⁸⁹ They were again substantially revised in recent years pursuant to proposals of an Advisory Committee.⁹⁰

4. *Federal Rules of Civil Procedure.* Section 34 of the Judiciary Act of 1789 provided:

That the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.⁹¹

This "Rules of Decision Act" left it unclear whether state law was to govern procedure. The problem was remedied by the subsequent Process

79. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275.

80. Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516.

81. 44 U.S. (3 How.) iii (1844).

82. 254 U.S. 671 (1921).

83. 383 U.S. 1029 (1966).

84. The Federal Rules of Civil Procedure do contain a supplemental list of special admiralty rules. See FED. R. CIV. P. 9(h), 14(a), 14(c), 38(e), 82, and Supp. Rules A-F. Prize proceedings are governed by 10 U.S.C. §§ 7651-81 (1970), pursuant to FED. R. CIV. P. 81(a). See generally HART & WECHSLER, *supra* note 50, at 666-67.

85. Act of July 1, 1898, ch. 541, 30 Stat. 544.

86. Act of June 22, 1938, ch. 575, 52 Stat. 840 (Chandler Act).

87. The bankruptcy laws are compiled in title 11 of the United States Code.

88. 172 U.S. 653 (1898).

89. 305 U.S. 677 (1939).

90. 96 S. Ct., rule amendments at 1 (July 1, 1976) (Chapter VIII); 96 S. Ct., rule amendments at 43 (June 1, 1976) (Chapter IX); 421 U.S. 1019 (1975) (Chapters X and XII); 415 U.S. 1003 (1974) (Chapter XI); 411 U.S. 989 (1973) (Chapters I-VIII).

91. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73.

Act of 1789, which required federal courts to follow, in actions at law, state procedure in effect at the time of the passage of the Act.⁹² The Process Act of 1792 ratified this provision but made it subject to the rulemaking power of the Supreme Court and lower federal courts.⁹³

While the Judiciary Act of 1789 dictated a dynamic conformity for substantive law, the Process Act of 1792 imposed a static conformity for procedural law. The courts did not exercise their rulemaking powers to alleviate this awkward situation. By the Conformity Act of June 1, 1872,⁹⁴ Congress replaced the rule of static conformity for procedure with dynamic conformity, and withdrew the theretofore unused judicial rulemaking power over procedure in actions at law.⁹⁵

Despite the Conformity Act, distinctive federal practices began to emerge.⁹⁶ A sense that necessary procedural reform could be accomplished only by court rules drafted by judges and lawyers led to a movement for uniform federal procedural rules for civil cases.⁹⁷ This movement culminated, in 1934, in the passage by Congress of an act empowering the Supreme Court

to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.⁹⁸

Chief Justice Hughes led the Supreme Court in responding promptly to the rulemaking mandate.⁹⁹ In 1935, the Court issued a formal order appointing an Advisory Committee composed of eminent members of the legal profession.¹⁰⁰ The Advisory Committee's proposed rules received extensive evaluation and criticism by special bar and judicial committees. Its final proposals were approved with minor changes by the Supreme Court, and became effective on September 16, 1938.¹⁰¹ The rules were subsequently amended with the assistance of the Advisory Committee.¹⁰² In 1958 Congress ordered the Judicial Conference of the United States to

carry on a continuous study of the operation and effect of the

92. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

93. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275. See also Act of March 2, 1793, ch. 22, § 7, 1 Stat. 333.

94. Act of June 1, 1872, ch. 255, 17 Stat. 196.

95. *Id.* § 5.

96. See *Herron v. Southern Pacific*, 283 U.S. 91 (1931); *McDonald v. Pless*, 238 U.S. 264 (1915); *Hearings on S. 2061 Before a Subcomm. of the Senate Comm. on the Judiciary*, 68th Cong., 1st Sess. 54 (1924) (remarks of Sutherland, J.); Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 401-11 (1935).

97. See Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934).

98. Act of June 19, 1934, ch. 651, 48 Stat. 1064.

99. 13 ALI PROCEEDINGS 61 (1935-1936).

100. Appointment of Comm. to Draft Unified System of Equity and Law. Rules. 295 U.S. 774 (1935).

101. 308 U.S. 645 (1938).

102. 341 U.S. 959 (1951); 335 U.S. 919 (1948); 329 U.S. 839 (1947); 308 U.S. 642 (1939).

general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law.¹⁰³

5. *Federal Rules of Criminal Procedure.* Prior to the promulgation of federal rules, federal criminal procedure was no more than an unwieldy conglomeration of common law practice, constitutional requirements, ad hoc legislation, and references to state laws.¹⁰⁴ Congress initially sought to resolve difficulties regarding procedure after verdict, and in 1933 authorized the Supreme Court to devise rules for this area.¹⁰⁵ In 1940, Congress expanded the Court's authority by allowing it to draft rules for criminal proceedings prior to and including the verdict.¹⁰⁶ The resulting Federal Rules of Criminal Procedure became effective in 1946,¹⁰⁷ and have since been amended several times.¹⁰⁸

6. *Federal Rules of Appellate Procedure.* In 1968, rules concerning appeals were severed from those applicable to trial procedure. A separate set of Rules of Appellate Procedure was promulgated pursuant to an advisory committee's recommendations.¹⁰⁹

7. *Federal Rules of Evidence.* In early years there had been considerable confusion about "whether given evidence questions were to be decided in accordance with the Competency of Witnesses Act, the Rules of Decision Act, the Conformity Act . . . , or some other standard."¹¹⁰ It was not until 1942 that the American Law Institute's Model Code of Evidence was formally adopted, and not until 1953 that the Commissioners on Uniform State Laws promulgated the Uniform Rules of Evidence. Relying in part on the availability of these models and on the need for clarification and improvement of the federal law of evidence, critics increased pressure for federal rules.¹¹¹ Shortly thereafter, a Special Committee on Evidence appointed in 1961¹¹² by the Chief Justice concluded that the rulemaking "power conferred by . . . enabling acts of Congress,"¹¹³ permitted prom-

103. 28 U.S.C. § 331 (1970). See also Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUD. Soc'y 250, 253 (1963).

104. HART & WECHSLER, *supra* note 50, at 667.

105. Act of February 24, 1933, ch. 119, 47 Stat. 904, as amended, Act of March 8, 1934, ch. 49, 48 Stat. 399, reenacted, 18 U.S.C. § 3772 (1970).

106. Act of June 29, 1940, ch. 445, 54 Stat. 688, reenacted, 18 U.S.C. § 3771 (1970).

107. 327 U.S. 821 (1946).

108. See 96 S. Ct., rule amendments at 1 (June 1, 1976); 419 U.S. 1133 (1975); 416 U.S. 1001 (1974); 415 U.S. 1056 (1974); 406 U.S. 979 (1972); 401 U.S. 1025 (1971); 389 U.S. 1125 (1968); 383 U.S. 1087 (1966); 350 U.S. 1017 (1956); 346 U.S. 941 (1954); 335 U.S. 917, 949 (1948).

109. 389 U.S. 1063 (1968).

110. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 3 (Feb. 1962) (footnotes omitted) [hereinafter cited as PRELIMINARY REPORT ON EVIDENCE].

111. See, e.g., Estes, *The Need for Uniform Rules of Evidence in the Federal Courts*, 24 F.R.D. 331 (1960); Report of the Special Comm. on Uniform Evidence Rules for Fed. Cts. to the House of Delegates, American Bar Association, 44 A.B.A.J. 1113 (1958); Green, *The Admissibility of Evidence Under the Federal Rules*, 55 HARV. L. REV. 197, 225 (1941).

112. PRELIMINARY REPORT ON EVIDENCE, *supra* note 110, at 2.

113. *Id.* at 29 (emphasis added).

ulgation of rules of evidence,¹¹⁴ and recommended that the Supreme Court formulate such rules.¹¹⁵ The Federal Rules of Evidence were finally approved by Congress in 1975, after years of work and controversy. Professor Cleary has noted that "[t]he rules as finally enacted are the joint product of the rulemaking process as evolved by the Supreme Court and the legislative process as conducted by the two houses of the Congress."¹¹⁶

In sum, the national rulemaking experience demonstrates no rigidity in doctrine or practice. While changes in the process of rulemaking have often lagged behind the need for change, lethargy more than ideology has been responsible for outmoded practice in rulemaking. There are now clear signals that further changes are needed in the way rules for courts are developed.

III. IDEOLOGY SUCCEDES TO PRACTICALITY: COURTS AND LEGISLATURE BOTH HAVE A ROLE IN RULEMAKING

As demonstrated above, the history of rulemaking at the federal level shows a practical accommodation between the legislature and the courts. There have been serious suggestions, however, that the legislature can have no role in rulemaking. Generally this claim has been ignored by those charged with the practical task of running government. Recent history in New Jersey and elsewhere is instructive.

A. *The New Jersey Experience*

The New Jersey Supreme Court under Chief Justice Vanderbilt, relying on a state constitutional provision granting rulemaking power to the courts,¹¹⁷ took the position in *Winberry v. Salisbury*¹¹⁸ that its rulemaking power was not subject to legislative control: a rule would stand even if it were inconsistent with a subsequently adopted statute.¹¹⁹ In support of its position, the New Jersey court pointed to the "intolerable" conflict that would result if its overruling of a statute by court-made rule were followed

114. *Id.* at 32 n.125, 35 n.138.

115. *Id.* at 48-54.

116. Cleary, *Preface to FED. R. EVID.*, at v (Federal Judicial Center ed. 1975).

117. N.J. CONST. art. VI, § 2, ¶ 3: "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts."

118. 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950).

119. *Id.* at 255, 74 A.2d at 414. The New Jersey court continues to cite *Winberry* with approval. See *American Trial Lawyers v. New Jersey Supreme Court*, 66 N.J. 258, 262, 330 A.2d 350, 352 (1974) (contingent fees); *Columbia Lumber & Millwork Co. v. New Jersey Supreme Court*, 12 N.J. 117, 95 A.2d 914 (1953) (*Winberry* applied to hold a statute in conflict with a court rule invalid). The decision is examined in Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951) and Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952). For a discussion of issues raised by *Winberry*, see Levin & Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958); Note, 27 RUTGERS L. REV. 345 (1974).

by legislative readoption of the statute, and, in turn, judicial readoption of the rule.¹²⁰ But as Professor (now Judge) Kaplan and his associate, Greene, have pointed out, the problem is not insoluble given the assumption "that court and legislature will exhibit a decent amount of mutual respect and tolerance."¹²¹

The New Jersey position in *Winberry* is almost unique. Other courts have taken what Kaplan and Greene refer to as "the circumspect approach"¹²² in working cooperatively with the legislature.¹²³ The majority approach seems the wiser one; so long as the legislature is not seeking to destroy a court's power to act effectively, statutes should supersede rules. The Anglo-American experience with rulemaking demonstrates no need for the courts to have unfettered control over procedure through rulemaking. Should a legislature's acts deny due process or infringe other constitutionally protected rights, the courts have reserve adjudicative powers to strike down the offending legislation.¹²⁴

There has been in the last fifty years "a growing recognition of the soundness of the policy of vesting comprehensive rule-making power in the courts, with accountability in the last analysis in the legislature."¹²⁵ No serious student of the subject would today accept Wigmore's thesis that the legislature has no power to effect judicial procedure.¹²⁶

New Jersey's near-fiasco over rules of evidence shows why the absolutist attitude of Justice Vanderbilt and a few others on the issue of procedural rules cannot be sustained. In 1954, the Supreme Court of New Jersey appointed an advisory committee to study the Uniform Rules of Evidence which had just been approved by the American Bar Association. That committee published its report in May, 1955, comparing the Uniform Rules with existing New Jersey evidence law, making recommendations for amendments, and calling for adoption.¹²⁷ In October of that year the legislature appointed a special commission to study the Uniform Rules and make recommendations. Its report was issued in November, 1956.¹²⁸

As a result of the conflict between the branches over whether the rules should be adopted by the state supreme court pursuant to its constitutional authority to regulate practice and procedure,¹²⁹ or by the legislature in the

120. 5 N.J. at 244, 74 A.2d at 408.

121. Kaplan & Greene, *supra* note 119, at 247.

122. *Id.* at 247 n.60.

123. *See, e.g.*, Grant v. Curtin, 71 A.2d 304 (Md. Ct. App. 1950).

124. *See, e.g.*, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (statutory garnishment proceedings invalid).

125. Kaplan & Greene, *supra* note 119, at 251.

126. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928), reprinted in 20 J. AM. JUD. SOC'Y 159 (1936). *See* Pound, *The Rule Making Power of the Courts*, 12 A.B.A.J. 599, 600 (1926).

127. REPORT OF THE COMM. ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955).

128. REPORT OF THE COMM'N TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE OF THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY (1956).

129. N.J. CONST. art. VI, § 2, ¶ 3. The text of this provision is set forth in note 117 *supra*.

form of a statute,¹³⁰ action on the evidence rules was stalled for the next several years. At the heart of this dispute, of course, was the position taken by the court in *Winberry*.

After Chief Justice Vanderbilt died, his successor, Chief Justice Weintraub, met with legislative leaders to work out a practical compromise. Pursuant to their agreement, the New Jersey Evidence Act of 1960 was adopted.¹³¹ The Act included the rules of privilege and a modified Dead Man statute, and provided detailed procedures authorizing the supreme court to adopt the remaining rules of evidence. One provision required that proposed rules be presented, before adoption, to a judicial conference at which the various courts and bar associations, the legislature, the Attorney General, county prosecutors, law schools and "members of the Public" would be represented.¹³²

As part of the arrangement between the chief justice and legislative leaders, the Supreme Court of New Jersey appointed a second advisory committee in 1960. The rules proposed by the advisory committee were adopted by the supreme court in 1964 to become effective, pursuant to the provisions of the Act, in 1965.¹³³ However the legislature, through a series of amendments, delayed the effective date to 1967.¹³⁴

It is interesting that after enactment of the rules of evidence the New Jersey legislature created a "Permanent State Rules of Evidence Review Commission," consisting of members of the legislature and private citizens, to advise the legislature with respect to future proposed changes in the rules.¹³⁵ The Commission's title was later amended to substitute the word "Court" for "Evidence,"¹³⁶ suggesting that the *Winberry* case was subject to still further erosion. In effect, New Jersey seems to be approaching much the same practical balance in rulemaking as other American jurisdictions; although commentators still talk of "complete" rulemaking

130. See, e.g., *How Shall the Proposed Code of Evidence be Adopted*, 78 N.J.L.J. 316 (1955); *Report on Manner of Adopting Proposed Evidence Code*, 78 N.J.L.J. 349 (1955) (reporting suggestion of Essex County Bar Association that the legislature, and then the court, adopt the same provisions as a way out of the impasse); Kean, *An Analysis of the Report of the Legislative Commission to Study the Improvement of the Law of Evidence*, 79 N.J.L.J. 473 (1956); *Evidence Revision by Cooperation*, 79 N.J.L.J. 496 (1956) (editorial calling for cooperation); *Vanderbilt Critical of Evidence Bill*, 80 N.J.L.J. 213 (1957); *Bigelow Urges Codification of Evidence Rule*, 80 N.J.L.J. 205 (1957); *Statement by Josiah Stryker at Legislative Hearing on Evidence Revision*, 80 N.J.L.J. 211 (1957); *Milton Submits Comments on Evidence Revision*, 80 N.J.L.J. 241 (1957); *Codification of Evidence Law Favored by Unanimous Vote*, 80 N.J.L.J. 253 (1957); *Statement of Milton T. Lasher, President, New Jersey State Bar Association, Concerning the Proposed Evidence Code*, 80 N.J.L.J. 269 (1957). See also Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 VAND. L. REV. 725, 736 (1961); Brooks, *Evidence*, 14 RUTGERS L. REV. 390, 391-92 (1960).

131. L. 1960, c. 52, p. 461, § 33 (codified at N.J.S.A. 2A:84A-33 (West 1976)).

132. N.J.S.A. 2A:84A-34 (West 1976).

133. N.J.S.A. 2A:84A-35 (West 1976).

134. See generally L. 1965, c. 56, § 2, as amended by L. 1966, c. 184, § 2; L. 1967, c. 3, § 1 (codified at N.J.S.A. 2A: 84A-35 (West 1976)).

135. L. 1968, c. 183, § 1, eff. July 19, 1968 (codified at N.J.S.A. 2A:84A-39.1 (West 1976)).

136. L. 1970, c. 258, § 2, eff. Nov. 2, 1970 (codified at N.J.S.A. 2A:84A-39.1 (West 1976)).

power not subject to subsequent action by the legislature,¹³⁷ the concept is essentially illusory.¹³⁸

B. *Experience in Other States*

Despite the untenability of the New Jersey position, courts still flex their muscles occasionally, making extravagant claims of exclusive power over rules.¹³⁹ An extreme example is provided by *State v. Clemente*,¹⁴⁰ in which the Connecticut Supreme Court struck down a statute granting criminal defendants discovery rights equivalent to those provided by section 3500 of title 18 of the United States Code, under the theory that the legislature had no authority to make rules for the court. In a thorough historical analysis of Connecticut cases, Professor Kay has termed the decision to be of a "radical character."¹⁴¹ He concludes:

[T]he best safeguard to the proper balance between the courts and other departments of government lies in the responsibility of judges to exercise restraint and temperance in deciding questions touching upon their own power. In the assertion of exclusive and supreme power over matters of practice and procedure, the Connecticut Supreme Court has failed in that responsibility.¹⁴²

Apparently, the New Mexico Supreme Court has also taken this extreme position recently. In Rule 501 of its Rules of Evidence the state supreme court provides:

Except as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege. . . .¹⁴³

Not only has the court thus abolished prior statutory privileges,¹⁴⁴ but it

137. See, e.g., Note, *The Rule-Making Powers of the Illinois Supreme Court*, 1965 U. ILL. L.F. 903, 906.

138. Nevertheless, New Jersey courts retain more freedom than most to deal with substantive issues through rulemaking rather than adjudication. *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973), dismissed for want of a federal question, 414 U.S. 1106 (1973), noted in 27 RUTGERS L. REV. 345 (1974), a recent decision to control the substantive question of prejudgment interest by rule, extends rulemaking power further than most authorities would permit. Criticizing this expansionist approach, Professor Lynch has called it "An Undue Process." Lynch, *The New Jersey Supreme Court and the Counsel Fees Rule: Procedure or Substance and Remedy*, 4 SETON HALL L. REV. 19: 421, 496 (1972-73).

139. See, e.g., *Cohn v. Borchart Affiliations*, 30 App. Div. 2d 74, 289 N.Y.S.2d 771 (1st Dep't 1968), *rev'd*, 25 N.Y.2d 237, 303 N.Y.S.2d 633 (1969) (provision governing dismissal for failure to prosecute held invalid), noted in 43 N.Y.U. L. REV. 776 (1968); *State v. Clemente*, 166 Conn. 501, 353 A.2d 723, 727 (1974), strongly criticized in Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1 (1975); *State v. Bridenbager*, 257 Ind. 699, 707, 279 N.E.2d 794, 796 (1972); *Newell v. State*, 308 So. 2d 71, 77 (Miss. 1975); *State v. Smith*, 84 Wash. 2d 498, 527 P.2d 674, 677 (1974).

140. 166 Conn. 501, 353 A.2d 723 (1974).

141. Kay, *supra* note 139, at 22.

142. *Id.* at 43.

143. N.M. STAT. ANN. § 20-4-501 (Supp. 1975) (emphasis supplied). By contrast, FED. R. EVID. 501 acknowledges the legislature's power, as do the rules of other states which use the Federal Rules of Evidence as a model. See FLA. R. EVID. 50.501; ME. R. EVID. 501; NEV. R. SERV. § 49.015; WIS. R. EVID. 905-01.

144. N.M. STAT. ANN. § 20-1-12(c) (1953) (accountant); N.M. STAT. ANN. § 20-1-12.1 (1953) (news sources); N.M. STAT. ANN. § 54-11-39 (1953) (medical research); N.M.

has apparently taken the position that even statutory privileges subsequently enacted by the legislature would be invalid.¹⁴⁵

While it may sound like heresy to the staunch supporters of unfettered judicial rulemaking,¹⁴⁶ legislative control of procedure works fairly well where there are broad-based, active, well-financed agencies to prepare the necessary studies and legislation. Judge Tate has expressed such a view regarding the Louisiana system,¹⁴⁷ where the legislature makes court rules:

The writer is not convinced that . . . a transfer of rule-making powers [to the courts] is necessarily desirable at this time. On the whole, with the able ministrations of the Law Institute and Judicial Council and the respect shown by the legislature for these law-improvement agencies, statutory rule-making has worked well in Louisiana.¹⁴⁸

Even the most ardent supporters of rulemaking by the highest appellate court in the jurisdiction have had to concede that the power, when granted, often goes unused.¹⁴⁹

Procedural reform in this country has never been the sole prerogative of either legislature or courts. At times the courts have laid the framework for reform, as in the late eighteenth century.¹⁵⁰ At other times, during periods of judicial stagnation, as in the middle nineteenth century, legislative enactments such as the Field Code have been the primary vehicles for change.¹⁵¹ During the greater part of this century the most striking reforms have been achieved through court-made rules—most notably the various federal rules. Nonetheless, statutory changes have not been uncommon; they have ranged from business entry exception statutes¹⁵² to the multiple procedural innovations of no-fault automobile liability statutes.¹⁵³

STAT. ANN. § 67-30-17 (1953) (certified psychologist). See *Ammerman v. Hubbard Broadcasting, Inc.*, — N.M. —, 551 P.2d 1354 (1976) (striking down newsperson's privilege).

145. This assumption is based upon conversations of the author with members of the bench, bar and legislature of New Mexico. See also 2 J. WEINSTEIN & M. BERGER, *supra* note 19, ¶ 501[06] (Supp. 1976).

146. See, e.g., Ashman, *Measuring the Judicial Rule-Making Power*, 59 J. AM. JUD. SOC'Y 215 (1975).

147. Tate, *The Rule-Making Power of the Courts in Louisiana*, 24 LA. L. REV. 555, 568 (1964).

148. If rulemaking power were granted the courts, Judge Tate suggested that the legislature retain general supervisory power. "In the future, a less progressive court system might take too parochial a view of the regulation of judicial procedure; a matter which is after all the concern of our entire people, not just of the bench and bar." *Id.*

149. See, e.g., Ashman, *Measuring the Judicial Rule-Making Power*, 59 J. AM. JUD. SOC'Y 215, 219 (1975). For a full and excellent survey, see American Judicature Society, *Uses of the Judicial Rule-Making Power* (1974) (mimeograph).

150. See Nelson, *supra* note 40, at 98.

151. See, e.g., C. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 17-19 (1928); Pound, *David Dudley Field: An Appraisal* in *DAVID DUDLEY FIELD: CENTENARY ESSAYS I* (1949). Cf. Kaplan & Greene, *supra* note 119, at 252 (discussing legislative reform in New Jersey).

152. See, e.g., N.Y. CIV. PRAC. LAW & R. § 4518, *superseding* N.Y. CIV. PRAC. ACT § 374a (McKinney 1963). See also Act of June 25, 1948, ch. 646, 62 Stat. 945, *as amended*, 28 U.S.C. § 1732 (Supp. IV, 1974).

153. See, e.g., ILL. ANN. STAT. ch. 73, §§ 1065.150-.163 (Smith-Hurd 1965), *repealed*, 1976 Ill. Laws Pub. Act 78-1297, § 22; N.Y. INS. LAW §§ 670-77 (McKinney Supp. 1975); PA. STAT. ANN. tit. 40, §§ 1009.101-.701 (Purdon Supp. 1976).

In sum, some sort of role-sharing between courts and legislatures is both necessary and beneficial. Where courts have insisted on exclusive control over rulemaking, the practical results have not been useful.

IV. REFORMING NATIONAL RULEMAKING

A. *Congressional Power to Delegate and Modify Terms of Delegation*

In contrast to some of the states, the federal courts have recognized that rulemaking is ultimately a legislative power residing in Congress, although delegated in large measure to the courts. In upholding the validity of the Process Acts,¹⁵⁴ Chief Justice Marshall, writing for the Supreme Court in *Wayman v. Southard*,¹⁵⁵ recognized that an aspect of the Process Act of 1792 concerned the power of courts to prescribe rules for proceedings.¹⁵⁶ Mr. Justice Marshall thus seemed to view the courts' rulemaking power as descending by specific delegation from Congress rather than deriving from an independent judicial authority to formulate procedural rules.¹⁵⁷

At one time it might plausibly have been argued that delegation to the courts of such non-adjudicative functions as rulemaking was improper. History has, as already noted, made that argument untenable.

Congress' position as possessor and delegator of the rulemaking power is now assumed without question by the federal courts. The Supreme Court in *Sibbach v. Wilson & Co.*,¹⁵⁸ for example, simply asserted:

Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States.

. . .¹⁵⁹

Since the mid-1930's the rulemaking function has been delegated almost entirely to the courts; Congress' power over the area has been reduced to a monitoring status. As a result of the Supreme Court's long-standing acknowledgement of the congressional prerogative over rulemaking and the extensive delegation of this function to the courts, the only questions that have arisen concerning the rulemaking power involve the extent and propriety of the delegation to the courts. The Supreme Court addressed these issues in the *Sibbach* case.

In *Sibbach*, the Court was faced with a question of the validity of certain Federal Rules of Civil Procedure; Congress had been given an

154. See text accompanying notes 63-67 *supra*.

155. 23 U.S. (10 Wheat.) 1 (1825).

156. *Id.* at 41-42.

157. See *Beers v. Haughton*, 34 U.S. (9 Pet.) 329, 359-61 (1835); *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 53 (1825).

158. 312 U.S. 1 (1941).

159. *Id.* at 9-10.

opportunity to modify or veto these rules in accordance with the terms of the Enabling Act of 1934, but had not done so. The Court held that even though the Rules worked a major departure from past procedures, specific congressional approval was not necessary:

The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. The Preliminary Draft of the rules called attention to the contrary practice indicated by the *Botsford* case, as did the Report of the Advisory Committee and the notes prepared by the Committee to accompany the final version of the rules. That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted.¹⁶⁰

Justice Frankfurter, joined by Justices Black, Douglas, and Murphy, dissented, stating in part:

Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality. And so I conclude that to make the drastic change that [the rule in question] sought to introduce would require explicit legislation.¹⁶¹

The two views in the *Sibbach* case, then, present the dilemma resulting from the uncertain division of the rulemaking power between courts and legislature. Rulemaking of necessity falls into a blurred area where precise separation of the powers of the independent branches is inappropriate. Inapplicability of strict separation of powers theory does not, however, require total abandonment of the concept in the context of rulemaking. Experience with general powers of legislative delegation may supply some helpful guidelines in striking a proper balance between the roles of the courts and the legislature in rulemaking. The administrative agencies, which assume legislative, executive and judicial roles, furnish one useful analogy.

Under the traditional model of tripartite government, at least as formulated by the framers of the Constitution, Congress is the source of policy-making power. This is consonant with the fact that, of the three branches, Congress bears the closest relationship to the people—the ultimate source of power in any democracy. Under the doctrine of legislative delegation,

160. *Id.* at 15-16.

161. *Id.* at 18 (Frankfurter, J., dissenting).

Congress defers to the expertise of a delegate body, allowing it to act as a legislature in a particular area, under the general policy formula dictated by Congress. An outmoded theory of constitutional limits on legislative delegation held that if Congress failed to outline a sufficiently specific policy in the legislation creating the delegate body, the delegation failed and the acts of the delegate body were void.¹⁶² Largely because the courts abused this doctrine, using it to throttle economic and social legislation in the 1930's,¹⁶³ the theory of constitutional limits on delegation has been generally ignored or given mere lip service for several decades.¹⁶⁴ As one commentator has recently noted, this refusal by the courts to insist that Congress' policy-making role be preserved, coupled with Congress' own failure to assert its role, has contributed to one of the major governmental developments of recent times: a dramatic expansion of the powers of the executive branch (exercised largely through a myriad of semi-independent agencies), and a correspondingly drastic decline in the power of the legislative branch.¹⁶⁵

It may be that the courts still have a role to play in restoring to some degree the balance between executive and legislature, and that revival of the doctrine of constitutional limits on legislative delegation would be appropriate. Just as this doctrine may retain utility in the area of legislative policy control over the executive, it may also be useful in those areas in which the legislature supervises activities of the judicial branch. The position of Chief Justice Marshall in *Wayman v. Southard*¹⁶⁶ remains valid today: the rulemaking power of the courts is properly viewed as a legislative delegation.

It follows from this view that Congress should at least have the option of establishing basic policy guidelines for court rules. Thus, the practice of submitting proposed court rules for congressional approval or modification seems altogether appropriate; such a process conforms to the basic tenets of delegation theory.

It would be a mistake, however, for Congress to insist on reviewing proposed rules in minute detail. Rulemaking is delegated so that Congress may profit from the expertise of courts and specialists in areas of litigation procedure with which they are far more conversant than Congress. Unless

162. See, e.g., *Yakus v. United States*, 321 U.S. 414, 426 (1944); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415, 421, 430 (1935); *United States v. Chicago, Mil., St. P. & Pac. R.R.*, 282 U.S. 311, 324 (1931); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41-43 (1825).

163. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). For a discussion of *Schechter* the "sick chicken" litigation, see BELLUSH, *THE FAILURE OF THE NRA 168-70* (1975).

164. On the difficulties of defining constitutional limitations on the congressional delegation power, see I K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.01-.06 (1958); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561 (1947).

165. See Gewirtz, *The Courts, Congress and Executive Policy-Making*, 39 L. & CONTEMP. PROB. — (1976) (in publication). See generally A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041 (1975).

166. 23 U.S. (10 Wheat.) 1 (1825). See text accompanying note 155 *supra*.

Congress confines itself to the basic policy issues concerning the proposals submitted to it, the ends sought to be achieved by the delegation will be undercut.

The problem, of course, is to distinguish basic policy from mere detail. A few guidelines can be suggested. First, congressional review of the initial draft of a set of rules and of the new policies they reflect will generally be more appropriate than review of the occasional subsequent amendments, which usually only round out an existing policy framework. Only where new amendments depart sharply from already approved policies does congressional scrutiny seem desirable.¹⁶⁷

Second, Congress should scrutinize rules and amendments that may have a substantive effect more carefully than those that will probably have a technical or procedural effect.¹⁶⁸

Third, while many rules have substantive effect, some such rules seem more fitting for review than others. For example, court rules which would impair the ability of particular individuals to obtain a full hearing or to present evidence adequately would seem particularly appropriate for congressional scrutiny.¹⁶⁹ Public hearings at the drafting stage should help to reveal such areas of concern.

Obviously, any list of priorities for congressional review must be tentative. The effectiveness of the rulemaking mechanism under a delegation system depends heavily on the wisdom of Congress in exercising a considered restraint; absent this, the expertise of the various advisory committees will be almost valueless. Nonetheless, the delegation theory properly requires that congressional power to review be recognized. Historically, as already noted, such a balanced rulemaking process has proved effective.

If Congress is to exercise restraint, so, too, must the courts. Where substantial substantive policies are at stake or fundamental jurisdictional issues are raised, the courts should refrain from treating the matter by rules, but should, through the Judicial Conference or groups such as the American Bar Association, seek appropriate legislation. In retrospect, for example, it probably was a mistake for the Supreme Court and the Advisory Committee on Evidence to attempt to force uniform privilege rules on the federal courts.¹⁷⁰ These proposals caused a furor in Congress which

167. In this regard, congressional review of the new Federal Rules of Evidence, particularly as they affect privileges, FED. R. EVID. 501, and of amendments to the Federal Rules of Criminal Procedure involving plea bargaining, FED. R. CRIM. P. 11(e), would be appropriate.

168. While it was not clear at the time of their adoption, amendments to the class action rules of the Federal Rules of Civil Procedure, FED. R. CIV. P. 23, probably fall within the former category.

169. Proposals dealing with habeas corpus proceedings might fall into this category.

170. See 2 J. WEINSTEIN & M. BERGER, *supra* note 19, § 501[01]. See also *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1319, 1357-59, 1628-44 (1976) (criticism of use of rulemaking power to modify the class action rule where the result may be major substantive impacts). The *Harvard Law Review* discussion illustrates well the complex relationship among

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rightly believed that they involved substantive policies. Similarly, reduction of jury size from twelve to six, discussed below in connection with local rules, should not have been accomplished through rules. Yet, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is now circulating a Proposed Rule 35.1 of the Federal Rules of Criminal Procedure, providing defendants with the right to appeal from sentences they consider too harsh.¹⁷¹ While appellate review of sentences seems to the author sound, there appears to be no basis in statutory authority or in the history of the courts of appeals warranting such extension of jurisdiction through exercise of the rulemaking authority.¹⁷² Appeals are covered by statute,¹⁷³ and the matter of sentencing review ought to be handled by statute as well, since it involves a substantial extension of the jurisdiction of the courts of appeals. Congress would have to consider the desirability of the rule and, if it were adopted, would need to add substantial personnel to the courts so that the new jurisdiction could be effectively exercised. The judgments in this area are not easy, particularly since excessive restraint may result in neither Congress nor the courts taking the necessary initiative.

B. Requirement of Public Deliberation

Inherent in the concept of delegation is the notion that it will be exercised by the body receiving the power within the legislative tradition of open and public deliberation. The 1973 Commission on Standards of Judicial Administration of the American Bar Association specifically noted that appropriate procedure should involve "opportunity on the part of members of the public and the bar to suggest, review and make recommendations concerning proposed rules,"¹⁷⁴ and that "the participation of judges, lawyers, legal scholars, and legislators in deliberations concerning the rules, the provision of staff assistance for research and drafting, and circulation of proposals for scrutiny and comment before their adoption" are desirable.¹⁷⁵ Most states utilize expert advisory groups—often judicial con-

various statutes and rules and the dangers involved when neither courts nor legislature take the initiative to resolve tangled substantive-procedural problems.

171. Letter to the "Bench and Bar" from the Chairman and the Secretary of the Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States (Sept. 30, 1976).

172. *Cf. Dorszynski v. United States*, 418 U.S. 424, 431 (1974) ("once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"). *But cf. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ADVISORY COMM. NOTE TO PROPOSED RULE 35.1*, at 5 (Sept. 1976) (finding rulemaking authority in present power of the courts of appeals to review sentences). If this rulemaking power exists, however, it is almost never utilized.

173. *See, e.g.*, 18 U.S.C. § 3731 (1970); 28 U.S.C. § 1291 (1970); 28 U.S.C. § 2106 (1970).

174. ABA COMM. ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION 63 (Tent. Draft 1973).

175. *Id.* at 64. *See also, e.g.*, Sunderland, *supra* note 97, at 33.

ferences and councils¹⁷⁶—to help draft statewide rules.¹⁷⁷ Such groups often provide an opportunity for the bar and other interested parties to suggest changes.¹⁷⁸ In addition, the effective date of new rules is usually set sufficiently far after promulgation to allow objections to be raised and hearings to be held.¹⁷⁹

Typical of the operation of such an expert body was the work of the California Law Revision Commission in the adoption of the California Rules of Evidence. The Commission's task was to prepare drafts for consideration by the legislature. It drew assistance from law professors who prepared the necessary research studies and it provided for publication and wide discussion of its preliminary proposals before submitting them for legislative scrutiny.¹⁸⁰ The rules ultimately adopted by the legislature were the end result of this process.¹⁸¹

The work of the new York State Committee to Advise and Consult with the Judicial Conference on the CPLR provides another example of the manner in which a body of expertise is utilized in rulemaking.¹⁸² The Committee, which reports to the New York Judicial Conference,¹⁸³ has modest appropriations with which it commissions studies by law professors on an ad hoc basis. The New York Civil Practice Law and Rules is subject to constant revision.¹⁸⁴ Under the New York practice, although statewide

176. J. Parness & C. Korbakes, *A Study of the Procedural Rule-Making Power in the United States*, app. III (Am. Judicature Soc'y, Aug. 1973) (mimeograph).

177. A. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 128-29 (1949).

178. *ADVISORY COMM. ON PRACTICE & PROCEDURE, THIRD PRELIMINARY REPORT*, N.Y. LEG. DOC. NO. 17, at 833 n.41 (1959).

179. The probability of obtaining a change after promulgation, however, like the chance of securing a rehearing, is slight because of the reluctance of most courts to acknowledge their errors.

180. *CALIFORNIA LAW REVISION COMM'N, RECOMMENDATION PROPOSING AN EVIDENCE CODE* 3-8 (1965).

181. *Id.* at 3-4 (1965). See generally 6 *CALIFORNIA LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES 1962-1964*; *CALIFORNIA LAW REVISION COMM'N, RECOMMENDATION PROPOSING AN EVIDENCE CODE* (1965). See also B. WITKIN, *CALIFORNIA EVIDENCE* §§ 5-6 (2d ed. 1966).

An instructive contrast to the operation of the California Law Revision Commission is seen in the functioning of the California Judicial Council, which has some limited power to make procedural rules. See B. WITKIN, 1 *CALIFORNIA PROCEDURE* §§ 119-20, 52-53, 126-31 (2d ed. 1970). The Council apparently does not publish its rules in advance of adoption to permit criticism—a failing which has been a source of irritation to the bar. *Id.*

182. *ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK*, 19 ANN. REP. A-27, LEG. DOC. NO. 90 (1974).

183. The New York Judicial Conference consists of the chief judge of the New York State Court of Appeals as chairman, the four presiding justices—one from each of the four departments, and judges representing the Surrogates Courts, County Courts, Court of Claims, Family Court, Criminal Court of the City of New York and Civil Court of the City of New York. The following ex-officio members by statute attend meetings of the Conference and make recommendations: the Chairman and the ranking minority member of the Judiciary Committees of the Senate and of the Assembly and the Chairman and ranking minority member of the Codes Committees of the Senate and Assembly. The State Administrator, who acts as Secretary, is assisted by the counsel, administration officer and extensive staff. *ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK*, 16 ANN. REP. 9-10, A-2 to A-11, LEG. DOC. NO. 90 (1971).

184. See, e.g., *Judicial Conference of the State of New York, Report to the 1976 Legislature in Relation to the Civil Practice Law and Rules and Proposed Amendments*

rules are promulgated by the Judicial Conference, subject to veto by the legislature, much of the initiative for drafting changes in the statutes as well as the rules comes from the Committee to Advise and Consult.¹⁸⁵ The system works fairly comfortably, although it would appear to be extremely awkward.

Recognition that judicial rulemaking must be a public process is healthy. When courts assume a legislative role, they also should exercise the restraints that properly accompany that role. Public deliberations are a basic safeguard to insure that the legislative process is fair and informed. Professors Leo Levin and Anthony Amsterdam have summarized the position well:

The whole aim of the balance of powers . . . is the creation of a scheme whereby the courts may maintain an effective, flexible and thorough-going control over their own administration and procedure, with the possibility of ultimate legislative review in cases where important decisions of public policy are necessarily involved. This is the aim of safe efficiency: immediately practical, fundamentally democratic.¹⁸⁶

C. Possible Supreme Court as Delegee of the Rulemaking Power

If delegation is possible and desirable, to whom may the power of rulemaking be delegated? The delegee should be chosen in a way that makes institutional sense, that seems meet in an historical framework, and that does no violence to our conceptions of separation of powers. From what has already been said, it is obvious that the Supreme Court and the individual lower courts could properly be delegated the responsibility of rulemaking. So, too, could an assembly of judges such as the United States Judicial Conference, or a committee appointed by judges and approved by Congress. While Congress has great latitude in delegating power, however, it cannot ignore the proper separation of roles of the executive, legislature, and courts.¹⁸⁷ It would, for example, seem improper today to delegate rulemaking power to the President or even to an executive agency such as the Department of Justice.

While it is clearly possible for Congress to delegate primary responsi-

Adopted Pursuant to Section 229 of the Judiciary Law (Feb. 1, 1976) (mimeograph) (studies and recommendations on, *inter alia*, notice of claim, attachment, replevin, arrest, and receivership; videotaping depositions; direct actions against liability insurance carriers).

185. Advice to the Judicial Conference is given by the Committee to Advise and Consult with the Judicial Conference on the C.P.L.R., consisting of leading members of the bar and law teaching profession. The recommendations of this group are based upon extensive studies, usually prepared by law professors. Its recommendations are generally followed by the Conference in amendments to the rules of the C.P.L.R. and, often, by the legislature in proposals to amend sections of the C.P.L.R. and related statutes. See, e.g., ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, 16 ANN. REP. A-28 to A-49, LEG. DOC. NO. 90 (1971).

186. Levin & Amsterdam, *supra* note 119, at 42.

187. See *Buckley v. Valeo*, 424 U.S. 1, 120-24 (1976).

bility for rulemaking to the Supreme Court, certain practical objections of considerable persuasiveness have been raised concerning such delegation. These will be considered in the following section.

D. *Practical Objections to the Exercise of Rulemaking Power by the Supreme Court*

In 1944 Justice Frankfurter opposed the adoption of the Federal Rules of Criminal Procedure on the ground that the Supreme Court would be unable to evaluate them effectively in view of its distance from the realities of day-to-day district court trial proceedings.¹⁸⁸ He also believed that it was undesirable for the Court to appear, through the issuance of rules, to prejudge issues that might come before it in litigation.¹⁸⁹ Justice Black also opposed, but without explanation, the adoption of the Federal Rules of Criminal Procedure. Justices Black and Douglas objected not only to particular sets of rules, but to the rulemaking process in general.¹⁹⁰ In opposing the 1963 amendments to the Federal Rules of Civil Procedure and recommending that rulemaking be carried out by the Judicial Conference, they stated:

We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our

188. Rules of Criminal Procedure, Order, 323 U.S. 821, 822 (1944) (memorandum of Frankfurter, J.).

In general, the changes made by the Supreme Court in the Rules forwarded to it have been miniscule. Perhaps the best known of the Court's infrequent modifications was the elimination of the work product rule proposed in 1946 by the Advisory Committee on the Civil Rules. See 4 MOORE'S FEDERAL PRACTICE ¶ 26.63[6], at 26-383 (2d ed. 1976). Since the issue was posed by a case pending before it, "the Court declined to adopt the amendment, preferring to handle the matter by decision." *id.* at 26-386, in *Hickman v. Taylor*, 329 U.S. 495 (1947). The *Hickman* doctrine was ultimately embodied in Rule 26(b) of the Federal Rules of Civil Procedure by the 1970 amendments. See 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2022, 2023 (1970).

Another significant modification effected by the Court occurred in connection with its action on the Federal Rules of Evidence. It was assumed by members of the Advisory Committee on Evidence that the major reason the Court returned for further study the first proposals for the new Rules of Evidence transmitted to it by the Judicial Conference was that it was evenly split on the definition of a "representative of the client" in the area of attorney-client privilege. This split was reflected in its inability either to adopt or to reject the definition in *Harper & Row, Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by equally divided court*, 400 U.S. 348 (1971), which rejected the restrictive "control group" test. See the history of the provision in 2 J. WEINSTEIN & M. BERGER, *supra* note 19, ¶ 503[01], at 503-14 and ¶ 503(b)[04], at 503-44. The next version forwarded to the Supreme Court and the one adopted by it omitted this definition. *Id.* There were, of course, many other changes in the new draft.

In the areas both of work product and privilege, contemporaneous litigation had apparently sharpened the Court's awareness of the subtleties involved, making it less eager to adopt categorical rules.

189. Rules of Criminal Procedure, Order, 323 U.S. 821, 822 (1944).

190. See, e.g., 368 U.S. 1012 (1961) (amendments to FED. R. CIV. P.); 374 U.S. 865 (1963) (amendments to FED. R. CIV. P.) (statement of Black and Douglas, JJ.); 383 U.S. 1031, 1032 (1966) (amendments to FED. R. CIV. P.) (Black, J., dissenting); 383 U.S. 1089 (1966) (amendments to FED. R. CRIM. P.) (Douglas, J., dissenting in part); 398 U.S. 979 (1970) (amendments to FED. R. CIV. P.); 401 U.S. 1019 (1971) (amendments to FED. R. CIV. P., FED. R. CRIM. P., FED. R. APP. P.).

judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President. The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate, and the President, not by the mere failure of the Congress to reject proposals of an outside agency. . . .

Instead of recommending change to the present rules, we recommend that the statute authorizing this Court to prescribe Rules of Civil Procedure, if it is to remain a law, be amended to place the responsibility upon the Judicial Conference rather than upon this Court. . . . It is . . . [the Conference and its Committees] who do the work, not we, and the rules have only our imprimatur. . . . Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid.¹⁹¹

In response to Justices Frankfurter, Douglas, and Black, the Supreme Court maintained that "[t]he fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency."¹⁹² The argument that the Court remains completely free in fact to reconsider judicially the rules it has adopted legislatively is not supported by the history of judicial review of rules.

In *Hanna v. Plumer*,¹⁹³ for example, the Court was called upon to determine whether Rule 4(d)(1) of the Federal Rules of Civil Procedure, as applied in a diversity action, ran afoul of the Constitution, the Enabling Act, or the holding of *Erie v. Tompkins*.¹⁹⁴ The Court, in upholding the validity of the rule against these challenges, relied in large part upon the bootstrap argument that adoption of the rule by the Court, and acquiescence by Congress, had created a presumption of validity:

When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.¹⁹⁵

The central issue posed by the case, however—whether Rule 4(d)(1) is substantive or procedural for purposes of *Erie* and of the Enabling Act—had never been considered by the Court or Congress in the context of a concrete fact situation during the course of the rulemaking process. Thus, the Court's bootstrapping hardly measured up to the level of neutral analy-

191. 374 U.S. at 865-66, 869-70 (amendments to FED. R. CIV. P.) (statement of Black and Douglas, JJ.).

192. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

193. 380 U.S. 460 (1965).

194. 304 U.S. 64 (1938).

195. 380 U.S. at 471.

sis that should be expected of the Supreme Court; the Court had, in effect, legislatively predetermined the issue by adopting the rule.

Hart and Wechsler summarize this dilemma by commenting that, "[t]o a significant extent, *Hanna* remits important *Erie* issues from the Court as a decider of cases to the Court (and its advisers) as a promulgator of rules."¹⁹⁶ The Court, then, may have taken a position on *Erie* issues which, as Justice Harlan points out in his concurrence in *Hanna*, involve constitutional questions basic to the federal system,¹⁹⁷ with neither the traditional legislative nor adjudicative safeguards. It may legitimately be asked whether the result in *Hanna* would have been the same if a district court had adopted the rule and the Supreme Court's own power, prestige and wisdom had not been at stake.¹⁹⁸

The secrecy which normally enshrouds the deliberations of the Supreme Court has given rise to another objection to its role in rulemaking. The legitimacy of rules, like that of any legislation, stems in large part from public access to the reasoning of the decision-makers; the Court's secrecy poses a threat to this legitimacy. An example of the problem occurred when the Court modified the informer privilege provided under the Federal Rules of Evidence so as to favor the government's position.¹⁹⁹ The failure of the Court to offer any explanation for the change did nothing to allay the suspicions of some that it had been influenced by the Attorney General's views, which had not been fully accepted by the Advisory Committee.²⁰⁰ The impenetrability of the Court's decisionmaking process contrasts with the openness of congressional procedures, under which hearings, reports and floor debates generally permit the reasons for important changes to be inferred, even if they are not explicit.

A third, and potentially quite serious, objection to rulemaking by the Court concerns the dangers posed by congressional criticism of Court-made rules. Such criticism creates an unnecessary conflict between the Court and Congress and reduces the Court's prestige and reputation for unbiased independence.

Finally, the flexibility of the Supreme Court in balancing a variety of constitutional, statutory and other factors is inhibited by its having adopted rules. The point is illustrated by Chief Judge Lumbard's forceful argument

196. HART & WECHSLER, *supra* note 50, at 748.

197. 380 U.S. at 474 (Harlan, J., concurring).

198. See generally 2 J. WEINSTEIN & M. BERGER, *supra* note 19, ¶ 501[01].

Hanna was strongly relied upon by the Advisory Committee in charge of drafting the Federal Rules of Evidence, and many commentators concluded that the Court could do whatever it wished in adopting these rules. Advisory Committee Note to Rule 501, in *id.* *Hanna*'s force has not been reduced by congressional revision of the Federal Rules of Evidence to eliminate rules of privilege. Congress did not overrule *Hanna*; it merely determined, on policy grounds, that rules of privilege should not be adopted through rule-making at this time.

199. 2 J. WEINSTEIN & M. BERGER, *supra* note 19, ¶ 510[01].

200. *Id.*, ¶ 510[01], at 510-17 to 510-18, ¶ 510[06], ¶ 510[07].

that extrajudicial rulemaking rather than the *Miranda* decision (in effect a set of Court-made rules) should have dealt with in-custody interrogation.²⁰¹ He argued: rules rather than a constitutionally-based decision might have been amended more easily; some experimentation with other techniques was desirable, and rules would have permitted this; rulemaking would have permitted full consideration of the views of other federal and state judges, members of the bar, law enforcement officers and others; the American Law Institute's then eighteen-month-old drafting project on a pre-arraignment code could have provided a more sophisticated draft covering more of "the many problems which follow in the wake of so complete a break with the past:"²⁰² and promulgation with an effective date in the future could have eliminated the problem of frustrating prosecutions in process.

All the advantages cited by Judge Lumbard would accrue if the rules were adopted by another judicial agency, with the Supreme Court retaining the right to depart from such rules where it believed the Constitution required different state standards, or where congressional statutes or the Court's power to control lower federal courts required modifications to meet special problems not foreseen or adequately dealt with by the rulemakers. The Court would not be inhibited in criticizing such rules since it did not promulgate them. The Court's input into the complex of lawmaking through adjudication could be reflected in subsequent amendments to the rules. The Court would thus stand above and apart from lawmaking, doing what it does best: considering a complex of constitutional provisions, statutory amendments, rules, prior decisions and changing societal and institutional needs in the context of particular problems presented in an adversarial setting. When, in contrast, the Court adopts rules almost blindly—as it must—the risk is considerable that it will needlessly sap two of its great institutional strengths—flexibility and dispassionate decision-making.

To summarize, at the present time the disadvantages to Supreme Court rulemaking seem to outweigh the advantages. First, since the members of the Court have less actual experience with details of lower court practice than any other judges, their judgment in such matters is apt to be less reliable; therefore they must, in the main, follow recommendations made to them. Second, the Court's prior adoption of rules substantially reduces its ability to evaluate independently whether such rules are consistent with federal statutes and with the Constitution when these issues are raised on appeal. As a result, important issues do not receive the constitutional scrutiny they merit. Third, where rules adopted by the Court are later

201. Lumbard, *Criminal Justice and the Rule-Making Power*. Address to Conference of Chief Justices in Honolulu (Aug. 3, 1967) (mimeograph).

202. *Id.* at 9.

rejected by Congress—as were the privilege provisions in the Proposed Rules of Evidence²⁰³—the Court has, in effect, rendered an advisory opinion which will inevitably guide the lower courts, thus departing unnecessarily from theoretical judicial doctrine. Finally, congressional criticism of the Court's exercise of rulemaking power is costly to the Court as an institution.²⁰⁴

The underlying point remains that the Supreme Court as a body has never challenged Congress' ultimate authority over rulemaking, even though the execution of this function has increasingly fallen to the courts. Historical precedent also makes it clear that Congress has the power to modify the way rulemaking is carried out. Since practical rather than ideological considerations have determined rulemaking procedures, Congress and the courts should not hesitate to consider further modifications in the process. No tradition or vested interest prevents a fresh look at the matter; the primary considerations that should dictate the nature of changes are practical ones.

E. *Proposals for Modifying the National Rulemaking Process*

The current American solution to the placement of rulemaking power resembles the British solution:²⁰⁵ authority is balanced between legislative and judicial branches, with fundamental responsibility delegated to a judicial offshoot, the Judicial Conference (and its attendant advisory committees). The Conference draft is theoretically subject to revisions by the Supreme Court, and Congress reserves power to set aside or revamp any provisions. This is a relatively recent division of responsibilities and has worked fairly well, although it shows some signs of weakness.

What is plain from the discussion to this point is that there are serious problems with present rulemaking procedure. Professor Lesnick has summarized special areas of concern:

—The lack of sufficiently widespread input by all segments of the legal profession and by the public, as a result of the procedures by which the Judicial Conference and the advisory committees reporting to it draft rules and recommend them to the Supreme Court.

—The relative unrepresentativeness of the advisory committees and the excessive centralization of authority in a single individual, the chief justice.

—The inappropriateness of utilization of the Supreme Court as the official promulgator of the rules.

—The lack of a meaningful mode of congressional review that does not undermine the rulemaking process itself.²⁰⁶

203. See text accompanying note 170 *supra*.

204. See also Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667 (1974) (criticism by former Justice Goldberg).

205. See note 37 *supra*.

206. Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A.J. 579-80 (1975). For further discussion, see *Hearings on Proposed Amendments to*

Lesnick's first three recommendations for change²⁰⁷ based on his critique are generally quite sound:

1. Judicial Conference procedures should be made more open and should be published.
2. The composition of the advisory committees should be more representative. . . .²⁰⁸
3. The assignment of a rule-promulgating role to the Supreme Court is unwise and inappropriate and should be re-examined.

Professor Lesnick also makes a number of suggestions regarding Congress' role in rulemaking. At present, rules of evidence do not take effect until one hundred and eighty days after they have been reported by the Chief Justice.²⁰⁹ Either house may reject or defer an amendment.²¹⁰ Any amendment "creating, abolishing, or modifying a privilege," must be approved by an act of Congress and thus must go to the President for signature.²¹¹ Other rules become effective ninety days after being reported to Congress and require an act of Congress for deferral or modification,²¹² except that criminal rules on "Procedure after verdict" need not be reported to Congress.²¹³ There is no persuasive reason why all this national rulemaking power should not be exercised in the same way and be subject to the same control by Congress.

Some of Professor Lesnick's suggestions would help to achieve that end. He would double the ninety-day period of delay to permit Congress a more realistic amount of time to consider the rules.²¹⁴ Congress needs more time than it now has for review of rules; yet it is still desirable to place some limit on the period so that necessary changes will not be put off indefinitely while Congress addresses itself to more pressing matters. Moreover, Professor Lesnick is on firm ground in objecting to the fact that one house alone may block changes. This creates "a real danger . . . of a prolonged stalemate. . . ." ²¹⁵

Professor Lesnick's last point seems more doubtful if it implies de-

Federal Rules of Criminal Procedure Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 197-209 (1974) (statement by H. Lesnick on behalf of Washington Council of Lawyers) [hereinafter cited as *Criminal Procedure Hearings*].

207. Lesnick, *supra* note 206, at 580-83.

208. The further point that Professor Lesnick makes, that "the appropriateness of the extreme centralization of authority in the chief justice should be examined," seems more doubtful. The present Chief Justice, Warren Burger, has devoted an enormous amount of energy to improving judicial administration. The author's observations of his work in a number of committees and at various official meetings suggests that the Chief Justice's leadership role has been useful and that this aspect of his work should not be limited. See Weinstein, *The Role of the Chief Judge in a Modern System of Justice*, 28 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 291 (1973).

209. 28 U.S.C. § 2076 (Supp. V 1975).

210. *Id.*

211. *Id.* See 5 J. WEINSTEIN & M. BERGER, *supra* note 19, at 1102-4 to 1102-13 for the history of this provision.

212. 18 U.S.C. § 3771 (1970); 28 U.S.C. §§ 2072, 2075 (1970).

213. 18 U.S.C. § 3772 (1970).

214. Lesnick, *supra* note 206, at 583 (1975).

215. *Id.* at 584.

tailed congressional revision of all proposed rules: "A workable mode of genuine congressional review needs to be devised."²¹⁶

Generally, the author believes that review by Congress should avoid attention to procedural details of court practice.²¹⁷ So long as the rules themselves are adopted by a judicial body with full legislative protections, including public participation in hearings, full notice of all changes, and adequate justification of rulemaking decisions,²¹⁸ there is no need to repeat hearings or to delay needed improvements in court practice. If a matter becomes important enough for detailed congressional intervention, legislation is probably desirable, with formal participation by both houses and the President.²¹⁹

The present Chief Justice of the United States apparently favors more effective coordination between the advisory committees, the Supreme Court and congressional committees in the drafting of proposed rules.²²⁰ The author does not care for the suggestion that all three branches of government participate in detailed drafting of the rules, through an independent commission or otherwise.²²¹ The legislature is sufficiently involved by

216. *Id.* at 583.

217. See also Hungate, *supra* note 16, at 1207 ("we should accord a healthy respect to any amendment proposed by the Supreme Court."). For an attack and defense of congressional action in the field of evidence, compare Copeland, *Who's Making the Rules Around Here Anyway?*, 62 A.B.A.J. 663 (1976) with Dennis, *We're Making the Rules*, 62 A.B.A.J. 1072 (1976).

218. See, e.g., *Evidence Hearings*, *supra* note 8, at 168 (statement of C.R. Halpern and G. T. Frampton, Jr.); *Criminal Procedure Hearings*, *supra* note 206, at 203 (statement of H. Lesnick).

219. An example is the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74 (Supp. V, 1975), Pub. L. No. 93-619, adopted after Rule 50(b) of the Federal Rules of Criminal Procedure had dealt with the same problem. The Act is discussed in connection with local rules at notes 266-71 and accompanying text *infra*. Since no speedy trial rule will work unless the courts are granted the personnel to make the rule a reality, congressional expression on the policy of speedy trials was desirable. It is noteworthy, however, that while Congress was quick to embrace the concept of speedy trials, it has been slow to supply the new judges needed to effectuate the policy.

220. Judge Thomsen, in presenting to the House subcommittee the proposed amendments to the new criminal rules, conveyed this message:

I am authorized to say that the Chief Justice, as well as members of the standing committee, believe it would be wise to have a closer relationship with members of the appropriate congressional committees while proposed rules are being discussed by the several advisory committees and by the standing committee of the Judicial Conference. Perhaps a member of your committee and a member of the appropriate Senate Committee, or someone from your respective staffs, might serve as members of the standing committee and of each of the advisory committees, or might attend meetings of those committees and comment on each proposal, as a representative of the Department of Justice sometimes is asked to do. . . .

Criminal Procedure Hearings, *supra* note 206, at 5.

Mr. Hungate, the Chairman, responded in part:

We will certainly call to the attention of Chairman Rodino your suggestions concerning the possibility of a closer liaison between the Congress and the Judicial Conference.

If I might interject at this point, I suppose that what happens with the rules of evidence will influence the nature of the liaison. If nothing happens, and nothing happens by the first of next August, we may have learned a lesson—Congress is indeed not capable to deal with these problems. I should point out however, that until recently the Congress has, more or less by default, let slide a responsibility that does belong to it.

Id. at 6.

221. In support of the suggestion of an independent commission, see *Criminal Procedure Hearings*, *supra* note 206, at 207; Lesnick, *supra* note 206, at 583.

passing on the rules after they are proposed to it; if Congress were to participate in the original drafting it might become too committed to a draft to exercise its power of review impartially. The executive branch need not be involved. It has sufficient input through memoranda and appearances by its representatives, particularly the Department of Justice. If there is a bill to delay or modify the rules, the President will have his usual veto power. Ad hoc independent commissions are not useful in solving on-going problems of rule revision.

Another option would be to make the Judicial Conference of the United States the active drafter and adopter of rules. This combined role would probably not be desirable.²²² The Conference is a rather unwieldy body, heavily dominated by the Chief Justice of the United States who appoints its committees. Its controlling members are the chief judges of the courts of appeals, who achieve their status through seniority, and representatives elected by the district judges of the circuits, who serve for a short time and whose influence is transient.²²³

What this body is ideally suited for, however, is the function now performed by the Supreme Court. It can do this job better than the Court, since its members are more familiar with current practice problems than are the Supreme Court Justices. Furthermore, shifting this function to the Conference would obviate the present danger to the Court's independent judgment when a rule is challenged before the Court.

Under this plan, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States would be given legislative recognition as the body which will directly, and through its advisory committees, make necessary studies, announce proposed changes, hold public hearings, draft rules, and justify changes. Its recommendations would then be passed upon by the Judicial Conference (taking the place of the Supreme Court). Congress should have a veto power if both houses act within one hundred and eighty days.

As a practical matter, there is now strong psychological pressure on individual advisory committee members to modify the rules as they think the Chief Justice would wish. It is the Chief Justice, after all, who appointed them. Moreover, his good will is required because as chairman of the Judicial Conference and as Chief Justice he will help shepherd the rules through the Conference and the Court and will have the necessary power and contacts to have an impact on Congress.

Much depends, of course, upon the interests and personality of the Chief Justice. His positive interest in improving practice is healthy.

222. Clark, *supra* note 103, at 256-57.

223. Cf. Oliver, *Reflections on the History of Circuit Judicial Councils and Circuit Judicial Conferences*, 64 F.R.D. 201, 212 (1975) ("[I]f effective and innovative procedures are ever to be designed for the improvement of the administration of justice on the trial court level, the suggestions for improvement will more likely come from trial judges and the trial bar than from any other source.").

Eliminating the Supreme Court's role would reduce his power somewhat, but probably not appreciably. As chairman of the Judicial Conference he would undoubtedly continue to have a great deal of influence, and properly so.

Members of the Standing Committee should be appointed by the Judicial Conference. Practically this will mean appointment by a nominating committee dominated by the Chief Justice. While it would be possible to subject the appointment of members of the Standing Committee or of its chairman to confirmation by the Senate,²²⁴ there would be no advantage in such confirmation; these offices should not be politicized. There seems to be no reason to challenge the power of the Judicial Conference to appoint a Standing or other committee to prepare drafts of rules. As already noted, the Conference has exercised power under grant of Congress to study the rules. Its existing Standing Committee has proposed the rules and amendments to the Supreme Court using the Conference as a conduit. While clause 2 of section 2 of Article II of the Constitution permits Congress to "vest the Appointment of . . . inferior Officers . . . in the *Courts of Law*,"²²⁵ there is no reason why a committee representing all the courts, such as the Judicial Conference, should not exercise the same power in this respect as any particular "court." All the members of the Judicial Conference have been appointed by the President and confirmed by the Senate as judges. Thus, authorizing the Conference to appoint rulemaking committees would merely give these judges additional duties consistent with those already being exercised. These are not "executive or administrative duties of a nonjudicial nature [which may] not be imposed on judges holding office under [article] III of the Constitution."²²⁶

The term of each member of the Standing Committee might be five years, with terms staggered. There might be a set ratio of, say, four judges, two of them appellate and two of them trial judges, at least two law professors, and at least four practitioners.

It is questionable whether there should be ex-officio members of the Standing Committee. It might be useful to have a designee of the American Bar Association who was actively involved in considering proposed changes in the federal rules for that group. Another ex-officio member might well be a representative of the Legal Services Corporation, which has recently been organized by the federal government to coordinate legal services to the poor. Ex-officio appointments, however, may lead to mediocrity since organizations tend to designate for honorific reasons. On balance, the Chief Justice and Judicial Conference can be trusted to pro-

224. For a discussion of the appointment power and congressional power to delegate the power to courts of law, see *Buckley v. Valeo*, 424 U.S. 1, 124-27 (1976).

225. Emphasis added.

226. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976).

vide representation from minority groups. Moreover, open hearings during earlier stages of rulemaking will permit broad participation in the process.

Using the United States Judicial Conference to appoint Standing Committee members will work well since the district court judges who are Conference members know persons active in practice and are in a good position to suggest candidates. Whether the Standing Committee or the Conference appoints advisory committees, and who should appoint reporters and subreporters, are details that should be left to the decision of the Judicial Conference.

The Judicial Conference will probably undertake little more revision of the proposals presented to it than the Supreme Court has done. Nevertheless, allowing the Judicial Conference to take the place of the Court in adopting rules will enable new rules to benefit from judicial imprimatur, while averting the problem of subsequent court bias in litigation challenging such rules. There is a definite value in the approval of the federal judges sitting as a group. The rules are more likely to be accepted by the bench, the bar, and the individual states in view of the prestige of such a group.

Of course, it is not possible to prevent Congress from being active in rulemaking if it chooses to be. The level of its activity is largely a function of the personalities of the chairperson and the members of the Judiciary Committee and subcommittees. It would be helpful, however, if Congress recognized that it should restrict itself primarily to consideration of the larger policy issues, rather than involve itself in the details of rulemaking.

The rulemaking process should be "both fair and feasible"²²⁷; thus, the Standing Committee should be required to hold public hearings. The experience of federal agencies in rulemaking is useful in this regard, even if not decisive.²²⁸ There is no reason why the courts should enjoy more relaxed standards for their own rulemaking than they require of administrative agencies. Since important legislative considerations are involved, a full oral hearing, not merely the right to submit written statements, should be afforded.²²⁹ The congressional hearings held in connection with the Federal Rules of Evidence furnish a satisfactory model.

Congressman Hungate, who had primary responsibility for guiding both the Rules of Evidence and recent amendments to the Rules of Criminal Procedure through Congress, has concluded from his experience that the time may now be ripe for Congress to re-examine the national rulemaking process.²³⁰ The author strongly concurs in that view.

227. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1315 (1975).

228. *Id.* at 1272-73, 1305-15.

229. *But cf.* *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973) (in absence of express congressional requirement, the Administrative Procedure Act does not require full oral hearing where the administrative agency is engaged in rulemaking, rather than in adjudicatory functions).

230. Hungate, *supra* note 16, at 1207.

V. LOCAL COURT RULES, GUIDELINES AND DIRECTIVES, AND INDIVIDUAL JUDGE'S RULES

A. Local Rules

Individual federal courts have had rulemaking power from their inception. The Act of March 2, 1793²³¹ provided:

That it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings. . . .²³²

The Conformity Act, however, by requiring state practice to be followed, severely restricted the exercise of this power.²³³

Today, authority for promulgating local rules is most often found in section 2071 of title 28 of the United States Code and Rule 83 of the Federal Rules of Civil Procedure.²³⁴ Section 2071 provides:

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.²³⁵

231. Ch. 22, § 7, 1 Stat. 335.

232. Other early statutes recognized a discretionary rulemaking power of the federal courts. *See, e.g.*, Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276; Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83. Such grants of power have been recognized as constitutional. *See Cooke v. Avery*, 147 U.S. 375, 386-87 (1893); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41-42 (1825). Later cases asserted the existence of a wide discretion in federal courts to set their own rules if necessary for "the advancement of justice and the prevention of delay in proceedings." *Shepard v. Adams*, 168 U.S. 618, 625 (1898). *See also* *The Columbia*, 100 F. 890, 894 (E.D.N.Y. 1900) (admiralty). For a discussion of the history of local rulemaking power, *see Note, Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1253-54 (1967) [hereinafter referred to as *Rule 83 Note*].

233. *See, e.g.*, *Chisholm v. Gilmer*, 299 U.S. 99 (1936); Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197.

234. *See In Re Sutter*, No. 76-1194, at 185-93 (2d Cir., Oct. 20, 1976) (holding valid local rule, "[w]hether grounded upon the inherent power of the court or upon rulemaking power conferred by 28 U.S.C. § 2071," under which attorney was fined \$1500 "costs" for recklessness in delaying trial). *But cf. Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729, 732 (3d Cir.) (en banc), cert. denied, 371 U.S. 888 (1962) ("[T]he local rule making power, while not limited to the trivial, cannot extend to basic disciplinary innovations requiring a uniform approach. Whether an attorney should be himself fined when, because of office oversight or neglect, he is late in complying with an order of the court is a substantial independent question which calls for mature consideration by the body charged with making Rule recommendations, the Supreme Court's advisory committee."), criticized in Comment, *Sanctions at Pretrial Stages*, 72 YALE L.J. 819, 830 (1963).

235. 28 U.S.C. § 2071 (1970). *See also* specific grants at 28 U.S.C. §§ 137, 139-41, 751-54, 1654, 1863(b), 1914(c) (1970) and the Speedy Trial Act, 18 U.S.C. § 3165 (Supp. V, 1975).

while Rule 83 of the Federal Rules of Civil Procedure states:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.²³⁶

Inherent power has also been relied upon.²³⁷

Lower state courts in this country also generally have power to make rules governing local practice. Federal and state local rulemaking are similar in that rulemaking procedure is not ordinarily prescribed by statute or rule. In a few states the lower courts must certify their rules to the higher courts before they become effective.²³⁸ Sometimes there is informal discussion with members of the bar and, less frequently, publication before adoption. Generally, however, the lower courts adopt rules without any systematic consultation or advance publication. Often, local rules are not kept up to date nor codified and are apparently difficult to find.²³⁹

One of the few thoughtful examinations of local federal rules suggests that they are a "maze of decentralized directives, encumbered by trivia and often devoid of explanation."²⁴⁰ The *Duke Law Journal* has analyzed local rules under the following headings, which give some idea of the range of practices affected:²⁴¹

1. Attorneys
2. Divisions within a District
3. Calendars and Motions
4. Pleadings
5. Notifications of a Claim of Unconstitutionality
6. Orders Grantable by the Clerk
7. Bonds and Undertakings
8. Depositions and Discovery
9. Pre-trial
10. Stipulations
11. Continuances
12. Dismissal for Want of Prosecution
13. Trial Conduct and Procedure

236. FED. R. CIV. P. 83. See also the specific grants in FED. R. CIV. P. 16, 40, 66, 78; FED. R. APP. P. 47; FED. R. CRIM. P. 57(a), 50(b) (requiring adoption of local speedy trial rules).

237. See, e.g., *United States v. Furey*, 514 F.2d 1098, 1103 (2d Cir. 1975) (speedy trial rule in criminal cases); *Shotkin v. Westinghouse Elec. & Mfg. Co.*, 169 F.2d 825, 826 (10th Cir. 1948) (power to dismiss for want of prosecution).

238. See, e.g., KY. REV. STAT. ANN. § 24.065 (BALDWIN 1970); MASS. ANN. LAWS c. 215, § 30 (Michie/Law. Co-op. 1974) (probate courts); OHIO REV. CODE ANN. § 2505.45 (Baldwin 1971); W. VA. R. CIV. P. 83 (1967).

239. In *Doran v. United States*, 475 F.2d 742, 743 (1st Cir. 1973) (per curiam), for example, there is a discussion of the need for keeping the local rules up-to-date and for arranging for their distribution.

240. Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011, 1012 [hereinafter cited as *Local Rules Comment*]. See Rule 83 Note, *supra* note 232.

241. *Local Rules Comment*, *supra* note 240, at 1013.

14. Impartial Medical Examinations and Testimony
15. Exhibits, Records, and Files
16. Juries: Empaneling and Instructions
17. Costs and Fees
18. Motions for New Trials
19. Appeals
20. Bankruptcy and Receivership
21. Habeas Corpus Procedure

Even this broad-ranging categorization does not complete the picture.²⁴²

Another comprehensive examination of local rules has concluded that

the majority of district courts have, in promulgating rules, ignored the principles of simplicity . . . and uniformity which guided the formulation of the Federal Rules. At times, district courts have used their power under Rule 83 to negate specific requirements of the Federal Rules; more often, simply to escape from the arduous but essential task of case-by-case analysis.²⁴³

As some of the discussion below indicates, the subject matter of local rulemaking continues to expand as local judges exercise their fertile imaginations in dealing with perceived problems.

Summarized, the case law, statutes and rules provide that the district courts may not formulate rules which are: "(1) Inconsistent with the Federal Rules, (2) Inconsistent with Federal Statutes, (3) Unreasonable, (4) Non-uniform and discriminatory."²⁴⁴ Nevertheless, control of local rulemaking power has been relatively ineffective.

One method of limiting local rulemaking is to require reports. Rule 83 of the Federal Rules of Civil Procedure mandates that local rules authorized thereunder "shall upon their promulgation be furnished to the Supreme Court of the United States."²⁴⁵ Other local rules, promulgated pursuant to Rule 47 of the Rules of Appellate Procedure, Rule 927 of the Bankruptcy Rules and Rule 57 of the Rules of Criminal Procedure, are filed with the Administrative Office of the United States Courts, which was established after Rule 83 of the Federal Rules of Civil Procedure had been

242. There are also rules which, *inter alia*, limit the right to appear pro se in civil rights cases, see M.D. ALA. R. 1; provide for six-member juries in civil cases, see, e.g., M.D. ALA. R. 1; forbid certain communications in class actions, see, e.g., S.D. TEX. R. 6; provide for expert panels, see W.D. MO. R. 23; outlaw use of photography, radio and television in environs of courthouse, M.D. PA. R. 101.16; require special forms of pleading and procedure in class actions, S.D.N.Y. R. 11A; require use of certain forms in pro se habeas corpus actions, W.D. OKLA. R. 5; and mandate separate trials for liability and damages, see Weinstein, *Routine Bifurcation of Jury Negligence Trial: An Example of the Questionable Use of Rule Making*, 14 VAND. L. REV. 831 (1961). For a further collection of practices regulated by local rules, see 12 WRIGHT & MILLER, *supra* note 188, § 3154.

243. *Rule 83 Note*, *supra* note 232, at 1251-52.

244. *Local Rules Comment*, *supra* note 240, at 1011 n.4 (citations and emphasis omitted). For a collection of cases in which local district court rules were declared invalid and in conflict with Rule 83, see 7 MOORE'S FEDERAL PRACTICE ¶ 83.03, at 83-4 (2d ed. 1976); see also 43 FORDHAM L. REV. 1086, 1096 nn.78 & 79 (1975).

245. FED. R. CIV. P. 83.

adopted. Only Rule 927 of the Bankruptcy Rules requires making the local rules "available to members of the Public who may request them."²⁴⁶

This reporting system provides no control at all.²⁴⁷ Filing does not imply approval by the Supreme Court or by the Administrative Office.²⁴⁸ Nor does central filing give effective notice to the public. While there is an unofficial service collecting all civil, general and admiralty rules,²⁴⁹ it does not include the local rules which affect criminal matters. There is no simple way for an attorney to obtain all local criminal rules. Nevertheless, an attack on a local rule on the ground that a copy was not sent to the Supreme Court or to the Administrative Office would seem to have little chance of success. As a result of these deficiencies, lack of familiarity with local rules may become a trap for unwary lawyers from other districts.²⁵⁰

A second method of control is through appeals in individual cases.²⁵¹ In most instances, however, the finality rule, limiting appeals from nondispositive orders, precludes interlocutory appeals challenging local rules. Moreover, local bar associations as well as attorneys have been reluctant to cross swords with local judges by formally challenging their rules.²⁵² The apathy of the bar also impedes challenge.²⁵³

On rare occasions the bar summons its courage to protest alleged overstepping by judges in rulemaking. An example is *Chicago Council of Lawyers v. Bauer*,²⁵⁴ where the Seventh Circuit declared invalid, on the ground of overbreadth, restrictions on the comments of lawyers about pending litigation. Treating the rules essentially as a prior restraint statute, and using normal statutory construction techniques, the court concluded that amendment to provide somewhat narrower free press-fair trial rules was advisable.²⁵⁵

246. See Bankruptcy Rules and Official Bankruptcy Forms, U.S.C.A. (West Pamph. 1975). The arrangements for public distribution are subject to the approval of the Director of Administration of the United States District Courts.

247. Communications from the Clerk of the Supreme Court and the Administrative Office to the author indicate that there is a passive filing without any attempt at supervision or analysis.

248. 12 WRIGHT & MILLER, *supra* note 188, § 3151 n.12.

249. FED. RULES SERV.

250. 12 WRIGHT & MILLER, *supra* note 188, § 3152, at 219.

251. See, e.g., *Mathews v. Weber*, 423 U.S. 261 (1976) (references to Magistrate); *Wingo v. Wedding*, 418 U.S. 461 (1974) (delegation to master of responsibility of conducting evidentiary hearing); *Miner v. Atlass*, 363 U.S. 641 (1960) (admiralty depositions); *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir. 1975) (communication with absent class members); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) (no comment rule).

252. See *Rule 83 Note*, *supra* note 232, at 1263.

253. In *Mathews v. Weber*, 423 U.S. 261 (1976), counsel for one of the parties had so lost interest in the matter that the Supreme Court had to appoint an amicus to argue the validity of a local rule dealing with references to magistrates, *id.* at 265 n.2—a curious example of the failure of the adversary system in the area of rulemaking.

254. 522 F.2d 242 (7th Cir. 1975).

255. *Id.* at 249. In an interesting concurrence, Senior United States District Judge Wyzanski, sitting by designation, questioned the action of the court on the ground that it was, in effect, issuing an advisory opinion.

Requiring approval of local rules by a superior court is a third method of control. Equity Rule 79,²⁵⁶ for example, required that district court rules be approved by a majority of the circuit court judges for the circuit. This limited form of control was abandoned with the adoption of Rule 83 of the Federal Rules of Civil Procedure.²⁵⁷ Although the Federal Rules Advisory Committee had considered sending the equity control rule to the Supreme Court as an alternative to Rule 83, in the end it submitted only Rule 83 which did not provide for supervision by the circuit judges.²⁵⁸ Professor Moore suggests that the Committee wanted to reduce the possibility of conflict between district and circuit judges.²⁵⁹

The technique of direct higher court supervision has been employed to a limited extent, particularly in connection with attempts to obtain speedy disposition of criminal cases.²⁶⁰ Rule 50(b) of the Federal Rules of Criminal Procedure, for example, gives both the judicial council of each circuit—consisting of the full-time judges of the court of appeals—and the Judicial Conference of the United States some input into and control over the local rules. It reads in part:

(b) Plan for Achieving Prompt Disposition of Criminal Cases. To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall . . . prepare a plan for the prompt disposition of criminal cases The district plan shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of the district court may designate. If approved the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States. The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States

. . . .²⁶¹

Such a system, though, runs the risk of predetermining any later challenge to a rule. Thus, in practice, the court of appeals will control absolutely the language of a district court speedy trial plan and, for the

256. 226 U.S. 673 (1912).

257. See *Rule 83 Note*, *supra* note 232, at 1265 n.77.

258. 7 MOORE'S FEDERAL PRACTICE ¶ 83.02, at 83-2 (2d ed. 1976).

259. *Id.* at 83-3.

260. Speedy Trial Act of 1974, 18 U.S.C. § 3165(c) (Supp. V, 1975) (plan "prepared by" the district court to be submitted to a reviewing panel consisting of the council of the circuit—that is, the full-time judges of the court of appeals—and the chief judge of the district whose rules are being reviewed, or his designee).

261. FED. R. CRIM. P. 50(b). The Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), refused to set precise guidelines because to do so "would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts." *Id.* at 523. For the subsequent history of speedy trial rules in one court, see *United States v. Salzmann*, 417 F. Supp. 1139 (E.D.N.Y.), *aff'd* — F.2d — (2d Cir. 1976).

sake of uniformity, the plan will have its genesis in the work of a committee of judges of the Judicial Conference of the United States or of the circuit council. Approval in advance by the circuit council means, in effect, that all the sitting non-senior appellate judges have ruled by advisory opinion that the local plan is desirable and valid. Accordingly, anyone arguing in an individual case that part of the plan is invalid can probably assume some bias in favor of the rule by the court of appeals.

The Second Circuit case of *United States v. Furey*²⁶² is illustrative. There, the Second Circuit panel had before it a rule of a district court adopted, pursuant to Rule 50(b), as part of its Plan for Achieving Prompt Disposition of Criminal Cases. The rule was based upon the "Second Circuit Model Plan" followed by all the districts in the circuit. In an attempt to have the rule invalidated, the government in *Furey* argued, *inter alia*, that Rule 50(b) itself was invalid since it did not meet the requirements of its enabling legislation, section 3771 of title 18 of the United States Code.²⁶³

The Second Circuit, in rejecting this challenge, stressed that Congress could have rejected Rule 50(b) but had failed to do so:

Yet despite ample opportunity to invalidate Rule 50(b) as failing to meet the requirements of § 3771, Congress chose to remain eloquently silent, permitting the rule to become effective. In these circumstances the words of the Supreme Court with regard to the Federal Rules of Civil Procedure in *Sibbach v. Wilson & Co.* are apposite:

The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently . . . employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules. . . .²⁶⁴

Of course neither Congress nor the Supreme Court had passed on the particular local rule in question. In effect, then, the Court of Appeals approved its own plan, without the safeguard of review by another body or a test before uncommitted judges in an adversarial setting. It is not the result in *Furey* but the process that is disquieting; courts, even more than administrative agencies, must maintain a sharp distinction between legislative and adjudicative functions if they wish to preserve a convincing appearance of impartiality.²⁶⁵

262. 514 F.2d 1098 (2d Cir. 1975).

263. Section 3771, 18 U.S.C. § 3771 (Supp. V, 1975). Section 3771 grants to the Supreme Court the power to make rules of pleading, practice, and procedure for criminal cases in the United States district courts.

264. *United States v. Furey*, 514 F.2d 1098, 1105 (2d Cir. 1975) (citation omitted).

265. In the few cases where local court rules have been declared invalid by a higher

The problem was highlighted even more dramatically in the Second Circuit when rules were adopted pursuant to the Speedy Trial Act of 1974.²⁶⁶ The Eastern District of New York had adopted rules which, in determining how long the prisoner had been detained before trial, excluded delays caused by defense counsel or the prisoner. Following a plan incorporated in the Act, similar to that of Rule 50(b) set out above, this provision was reported to the Second Circuit Council. The Council rejected the District's proposal and insisted on adoption of its "model" rule; it acted privately without giving the judges, the public, or the United States Attorney—who believed the "model" unsound and not required by the Speedy Trial Act—an opportunity to be heard. The Chief Judge of the Circuit felt that the interpretation of the Act by the inferior judges and the United States Attorney (who had submitted an extensive brief on legislative history to the district court judges) was without merit.²⁶⁷ Should the United States Attorney have challenged this speedy trial rule, he would probably have felt that the matter had been foreclosed without a hearing. The situation was particularly troubling because the extensive analysis of the legislative history and language of the Act prepared by a group of United States Attorneys indicated a substantial issue with respect to excludable delays under the Speedy Trial Act.²⁶⁸ That the matter was not free from doubt was suggested by the steady stream of announcements on speedy trials issued by the Administrative Office of the United States Courts.²⁶⁹

court, the higher court had not participated in making the rule. *See, e.g.*, *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir. 1975). Whether the higher courts have decided such cases correctly is not relevant to this discussion. What is clear is that a court which has not been involved in the drafting and approval of a rule is freer to act impartially in determining the validity of that rule in an adversarial setting.

266. 18 U.S.C. §§ 3161-74 (Supp. V, 1975). *See also* FEDERAL JUDICIAL CENTER, ANNUAL REPORT 14 (1975) (discussing the activities in this connection of the Center). *Cf.* United States Courts for the Second Circuit, 1975 Annual Report 93 (mimeograph) (description of planning activities introduced to expedite implementation of Act).

267. Letter of the Chief Judge of the Second Circuit, Irving Kaufman, to the author (October 14, 1975); Resolutions of the Eastern District of New York (October 20, 1975). *See also* letter of the Chief Judge of the Eastern District of New York, Jacob Mishler, to the Chief Judge of the Second Circuit (July 31, 1975) (suggesting that the Eastern District Court change to the model plan drafted by the Administrative Office), and the response (August 18, 1975); memorandum of Circuit Executive to Second Circuit Judges (August 22, 1975); memorandum of Chief Judge Mishler to the Eastern District Judges (September 17, 1975) (submitting "Judicial Council Recommended Amendments to Conform Rule 50(b)"); Memorandum of Judge Orin Judd to Chief Judge Mishler (October 6, 1975); Memorandum of the author to Chief Judge Mishler (October 8, 1975); Memorandum of Judge Judd to the Eastern District Judges (October 17, 1975); Letter of Judge Judd to Chief Judge of the Second Circuit (October 20, 1975); October 23 Memorandum of Judge Platt attached to Order of Eastern District Court (October 20, 1975); Memorandum of Judge Judd to the Judicial Council (October 28, 1975). Numerous requests that the Judicial Council hear the Eastern District Judges opposing the Second Circuit model were not acted upon. Minutes, Regular Meeting, Board of Judges of the United States District Court, Eastern District of New York (October 20, 1975).

268. *See, e.g.*, Telex to all U.S. Attorneys from H.M. Ray, Chairman, Legislative and Court Rules Subcommittee, Attorney General's Advisory Committee of United States Attorneys (Oct. 20, 1975); H.M. Ray, Speedy Trial Act of 1974: Applicability of Exclusions to Interim Limits (mimeograph, n.d. 1975).

269. *See* letter from the "Speedy Trial Coordinator" of the Administrative Office of the United States Courts to all federal judges (February 12, 1976) (listing numerous such an-

Subsequently, a special committee of judges of the Court of Appeals for the Second Circuit met with a judge of the Eastern District and worked out a compromise plan that met both courts' approval.²⁷⁰ The bar was never privy to these discussions despite the fact that it will be seriously affected by calendar problems created by the Speedy Trial Rules.²⁷¹

As the foregoing material illustrates, each of the commonly used methods of controlling local court rulemaking has its particular shortcomings. But the most pervasive deficiency in this area of rulemaking, and the one most seriously in need of correction, is the failure of local rulemaking procedures to provide to those affected by the proposed rules an opportunity to be heard. Some instances of this have already been noted, but further examples will emphasize the significance of the problem.

When the Second Circuit recently promulgated special training requirements for admission to its bar,²⁷² it failed to make advance public announcement of the new rule, and provided no chance for interested parties to argue in opposition to the change.²⁷³ By contrast, notice and public hearings were afforded in connection with Second Circuit proposals to restrict admission to the bar of district courts, and a serious debate developed.²⁷⁴ Ultimate rejection of the proposed district court rule in the Southern and Eastern Districts of New York²⁷⁵ dramatically illustrated the value of open discussion. The Council of the Second Circuit had supported the rule, and private communications from both the chief judge of the circuit and the Chief Justice of the United States had urged the district judges to consider the proposal favorably. In the absence of public hearings

nouncements). See also Administrative Office of the United States Courts, Report on Speedy Trial Act of 1974 (Sept. 30, 1976).

270. Minutes, Regular Meeting, Board of Judges of United States District Court, Eastern District of New York (June 21, 1976).

271. The proper role of judicial conferences and councils in working with bench and bar in administering the courts is beyond the scope of this Article. For a discussion bearing on this subject, see NAT'L CONF. OF FED. TRIAL JUDGES, *JUD. ADMIN. DIV.*, ABA, *A LOOK AT FEDERAL CIRCUIT JUDICIAL CONFERENCES AND COUNCILS*, 33, 48, 49, 53, 57, 60-63 (1976).

272. N.Y. FED. CT. R. 4-13.1 (2d Cir. 1975) (Standards for Practice by Attorneys).

273. The result is a rule which may well conflict with Rules 46(a) and 47 of the Federal Rules of Appellate Procedure since the Appellate Rules are designed to permit a national federal appellate bar ready access to all the courts of appeals. See generally Weinstein, *Proper and Improper Interactions Between Bench and Law School*, 50 ST. JOHN'S L. REV. 441, 451 n.31 (1976). It is somewhat amusing that the late Professor Bickel, who argued the Pentagon Papers cases in the Second Circuit and Supreme Court, would probably not have qualified for admission in the Circuit without some special exemption, since he had never argued a case in any court, save for a small claim in New Haven. See Polsky, *In Praise of Alexander Bickel*, COMMENTARY, January, 1976, at 52.

274. See, e.g., Ehrlich, *A Critique of the Proposed New Admission Rule for District Courts in the Second Circuit*, 61 A.B.A.J. 1385 (1975); Weinstein, *supra* note 273, at 451 n.31; statement of Dean Michael I. Sovern of the Columbia University School of Law at public hearings held November 20, 1974 at Association of the Bar of the City of New York (unpublished), appearing in another form at 67 F.R.D. 577 (1975). Committees of the Association of the Bar of the City of New York, the County Lawyers' Association, and the Federal Bar Council have opposed the proposals. See, e.g., 31 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 95 (Jan./Feb. 1976).

275. N.Y.L.J., Dec. 22, 1975, at 1, col. 3; N.Y.L.J., Dec. 16, 1975, at 1, col. 2. Some districts did, however, adopt the rule. See N.Y.L.J., Dec. 24, 1975, at 1, col. 3.

and debate there seems little doubt that the proposals would have been quietly adopted.

Still another example of important rules adopted first and opened to public debate later are those restricting citation of "non-published" decisions of federal courts of appeals.²⁷⁶ The various courts of appeals have adopted different rules on publication and citation, rules which have had a serious impact on publishers of opinions as well as on advocates. In light of their impact, a uniform approach to such rules is clearly desirable; yet studies by a committee of the United States Judicial Conference were undertaken only *after* the rules had been adopted.²⁷⁷ No judicial body had the authority to overrule the individual courts of appeals or to insist that they delay adoption of their rules. Even if the United States Judicial Conference had had the power, it probably would not have exercised it, since the normal deference extended to each chief judge sitting on the Conference would permit him to protect the rules of his own court.

By contrast, the Judicial Conference of the United States, through a special subcommittee working with the American Bar Association, has drafted "Uniform Rules of Disciplinary Enforcement" designed to be adopted by local federal courts.²⁷⁸ The subcommittee was of the view that such rules could not be adopted nationally pursuant to any statutory or inherent power of the Supreme Court.²⁷⁹ Accordingly, the Judicial Conference will probably promulgate them as guidelines and then urge each of the federal courts to adopt them. The only objection the author has to this procedure is that the proposals should be published generally before either promulgation or adoption. Some local and state bar associations have had extensive experience in disciplinary matters and lawyers should be heard.

Lack of public debate and publication of local rules before adoption is typical.²⁸⁰ Mere publication is probably not enough to remedy this situa-

276. See COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *OPINION WRITING AND PUBLICATION* 2 (1974); *STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS* 5 (FJC Research Series No. 73-2, August 1973).

277. See *United States v. Joly*, 493 F.2d 672, 675-76 (2d Cir. 1974); Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 387 (1973); Board of Federal Judicial Center, *Recommendations and Report to April 1972 Meeting of the Judicial Conference of the United States* (mimeograph); Subcomm. on Federal Jurisdiction, *Report to the Chairman and to the Members of the Comm. on Court Administration 9-10* (1972) (mimeograph) (containing responses from various courts of appeals); Administrative Office of United States Courts, *Report to the Subcomm. of Federal Jurisdiction on the Operation of Circuit Opinion Publication Plans* (Jan. 7, 1975) (mimeograph).

278. See letter from William E. Foley to all federal judges, dated October 1, 1976, with proposed "Uniform Rules of Disciplinary Enforcement."

279. *Id.*

280. As the Director of the Federal Judicial Center recently indicated, local district and circuit rules are not customarily published in advance and courts do not conduct hearings thereon. [With one exception] I know of no advance distribution of proposed rule changes although there are bench-bar committees in some areas and perhaps some minimal contact through that source.

Letter to the author (Jan. 5, 1976). An extreme example of this practice occurred in 1968 when "the Court of Appeals for the Fifth Circuit, without prior notice to or consultation with any segment of the bar, adopted the first significant 'screening' procedures for the curtailment and

tion. Members of the bar will generally fail to respond unless committees of the bar associations have studied the matter or unless the court itself appoints a committee or reaches out to invite public comment from those persons who should be interested. The meetings of the circuit conferences have sometimes been used to good effect in this connection. The experience in the Eastern District of New York, where most rules are published before adoption, is that almost no communications are received unless pointed questions are put to individuals and associations. In the Northern District of Illinois the experience has been similar.²⁸¹ Nevertheless, any effort to involve the bar and public is worthwhile: not only will it result in valuable suggestions and the avoidance of inadvertent errors, but also in greater acceptance of changes on the part of practicing lawyers and others.²⁸²

Adoption without an opportunity for those affected to be heard is undesirable. No rule adopted by a regulatory agency after such procedure would be permitted to stand.²⁸³ The lack of deliberation and public debate was apparently one reason the Supreme Court in *Miner v. Atlass*²⁸⁴ struck down a local rule permitting depositions in admiralty cases:

The problem . . . is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rulemaking powers of the Court . . . designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords.²⁸⁵

Such a result, however, is rare. The Supreme Court permitted a much

elimination of oral argument" in the Court of Appeals. Segal, *Trial Balloon—Oral Argument in the U.S. Court of Appeals: Can it be Salvaged?*, 2 LITIGATION 3 (Fall 1975). This was the same year in which Rule 34 of the Federal Rules of Appellate Procedure, dealing with oral argument, became effective. *Id.*

A memorandum of one of the project directors of the Judicial Center reflected the view of many judges when it noted:

{M}any proposed rules may be assumed to be likely sources of bar opposition, despite their merit. Apart from natural conservatism among the bar, many rules do impose additional burdens, which lawyers naturally oppose. Perhaps pre-publication or hearings would allow the courts to minimize the burdens. Perhaps, also, those procedures might harden bar opposition to rules that are desirable and necessary. Why take the chance?

Memorandum of Steven Flanders to Judge Walter E. Hoffman (December 22, 1975).

281. Memorandum of Steven Flanders to Judge Walter E. Hoffman (January 9, 1975); letter of H. Stuart Cunningham to author (January 22, 1976).

282. See, e.g., letter of Judge Eugene A. Wright, United States Court of Appeals for the Ninth Circuit, to the author (January 19, 1976):

From my experience in this court and in the state court system, I can tell you that it is always wise to work with a bar committee. Lawyers will accept rules, even those they do not like, if they have had an opportunity to be heard before the court finally adopts them. The Washington Supreme Court learned this years ago and it now gives at least six months' notice to the state bar before adopting any rule changes.

283. See generally 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 6.04-.06 (1958); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

284. 363 U.S. 641 (1960).

285. *Id.* at 650.

more controversial and radical change by local rulemaking when it approved six person juries in *Colgrove v. Battin*.²⁸⁶ The Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure and the Judicial Conference had all agreed that a reduction in the size of civil juries should be accomplished by statute rather than local rule or promulgation as an amendment to the Federal Rules of Civil Procedure.²⁸⁷ Despite the clearly sound conclusion that all the protections afforded by congressional hearings were desirable before the number of jurors was reduced, local federal rules reducing juries were promulgated widely in the wake of *Colgrove*.²⁸⁸ Generally, these local rules were adopted without open debate or full study.

It is doubtful that Congress would have readily approved such changes by statute or that it would not have questioned a like change in the Federal Rules of Civil Procedure. Before the Supreme Court decided *Colgrove*, Professor Moore pointed out that "[i]t would border on the quaint to suppose that the number of alternates is a matter requiring uniformity of practice under the Rules (Rule 47(b)) while the number of jurors is left to local rules."²⁸⁹ The Supreme Court, however, did not agree. Professor Zeisel has expressed grave doubt about the statistical validity of the data judicially noticed by the Supreme Court in *Colgrove*.²⁹⁰ The matter was certainly worthy of a more effective debate than it was accorded when it was attacked as a *fait accompli* in litigation that culminated in the Supreme Court in *Colgrove*. Earlier consideration of the matter by a group having national responsibilities and an effective forum for debate would have been useful.

B. Improvement in Local Rulemaking

As noted above, local rules are typically adopted without the aid of an advisory committee, without publication in advance, and without an opportunity for interested parties to be heard before the judges act in private.²⁹¹ Professors Wright and Miller accurately observe that

the process by which local rules are made is simply not suited for the complex and controversial subjects to which many local rules are addressed.

286. 413 U.S. 149 (1973).

287. 1971 UNITED STATES JUDICIAL CONFERENCE REPORT 5-6. 60.

288. See, e.g., N.D. ALA. R. 4; D. CONN. R. 12a; D. DEL. R. 14a; D.D.C. R. 1-17(a); N.D. FLA. R. 18. Eighty-two out of 94 federal district courts have now adopted some forms of the six member jury in civil cases. THE THIRD BRANCH, Sept., 1976, at 7, col. 2.

289. 7 MOORE'S FEDERAL PRACTICE ¶ 83.03n.4, at 83-86 2d ed. 1976.

290. Zeisel & Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U. CHI. L. REV. 281 (1974); Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. CHI. L. REV. 710 (1971). See also Lempert, *Uncovering Nondiscernible Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 694 (1975). 694 (1975).

291. Cf. *Doran v. United States*, 475 F.2d 742 (1st Cir. 1973) (United States Attorney not aware of rule; effective means of promulgation and recompilation should be developed).

. . . In a few districts a committee of local practitioners is consulted but this is the exception rather than the rule. In most districts the judges consult with each other and make local rules on their own. It is decidedly the exception for the bar and the law schools to be given an opportunity to comment on proposed drafts of local rules.

. . . It is wholly unsatisfactory as a means of dealing with such difficult and controversial topics as separate trial of liability from damages or impartial medical examinations. Yet these, and many other equally sensitive matters, have been thought the proper subject for local rules in many districts.²⁹²

In one instance of this general practice of in camera rules adoption, the Supreme Court of New Jersey took the flat position that maximum contingent fees could be established by rule without a prior evidentiary hearing.²⁹³ It relied upon judicial notice and on its "accumulated experience over the years."²⁹⁴ The court did, however, hold "an open meeting. . . with representatives of the Bar to elicit views as to the adoption of the rule."²⁹⁵ Such a meeting is a most unusual step in local rules promulgation.²⁹⁶ Yet, there is no practical reason why the public cannot be involved.

Some courts, such as the Eastern District of New York, have adopted the practice of publishing most proposed rules in advance, and sending copies to the various bar associations with a request for comments. Generally those comments have been sparse. The author's belief is that a hearing should be held at which testimony on the proposals is taken. Most judges, however, disagree; because of the paucity of comment received in the past, they have not felt such a hearing necessary. The author has concluded that were a hearing held and specific persons invited to testify, a useful debate could be generated on some of the proposals. Such hearings would also provide the bar with a forum for ventilating other grievances and making suggestions. When the Eastern District of New York was considering adopting its individual calendar assignment rules, for example, a public hearing was held. It was well attended and resulted in a number of useful suggestions as well as in a better understanding by both the bench and bar of the problems that the new rules might create.

Standing committees such as those used in connection with national rules might also help focus attention on local practice. If public participa-

292. 12 WRIGHT & MILLER, *supra* note 188, at 220.

293. American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974). See also American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467 (1973) (per curiam) (remand to three-judge federal court to await conclusion of state court proceedings). Cf. Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43 188 N.Y.S.2d 491 (1959), *appeal dismissed and cert. denied*, 361 U.S. 374 (1960) (courts have power to define excessive contingent fees for purposes of disciplinary action).

294. American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 266, 330 A.2d 350, 354 (1974).

295. *Id.* at 266 n.8, 330 A.2d at 354 n.8.

296. The New York court limitations on contingent fees were adopted after public hearings. See Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43 (1959), 188 N.Y.S.2d 491, *appeal dismissed and cert. denied*, 361 U.S. 374 (1960), noted in 60 COLUM. L. REV. 242 (1960).

tion is considered unwieldy, a court should at least avail itself of an advisory committee. Cognizant of the objection to ex parte promulgation, the federal judges in the Northern and Southern Districts of Iowa worked closely with the Special Committee on Federal Practice and Procedure of the Iowa State Bar Association in drafting rules for their courts.²⁹⁷

Professors Wright and Miller suggest that approval of local rules be required, "perhaps by the Standing Committee on Rules of Practice and Procedure or its parent body, the Judicial Conference of the United States, before they may go into effect."²⁹⁸ Professors Wright and Miller's alternative proposal, that the power be circumscribed by amending Federal Rule of Civil Procedure 83 and its criminal and appellate counterparts to specify "those few limited areas in which local rules may be made,"²⁹⁹ seems too restrictive and assumes a skill in drafting and prescience not normally available.

One advantage of having all local rules reported to a national rulemaking authority is that attention to developments might suggest areas where national standards should be considered.³⁰⁰ Lacunae in the national rules might be revealed and discrepancies in local practice identified, warranting elimination of conflicts for somewhat the same reason that the Supreme Court attempts to eliminate conflicts between the circuits. In *Miner v. Atlas*,³⁰¹ for example, the Supreme Court struck down local rules dealing with discovery in admiralty on the ground, among others, that uniformity was required, and then adopted a discovery-deposition rule for admiralty.³⁰² When new national rules are adopted, such as, for example, the amendment making uniform the order of the parties on summation,³⁰³ a national rulemaking authority could order conforming changes in local rules. Differences in local rules governing jury size may sometimes lead to inadvertent waivers, suggesting the need for uniform national treatment.

If the Judicial Conference of the United States were given some control over local rules, the chief judge of each circuit as well as the Chief

297. See Blair, *The New Local Rules for Federal Practice in Iowa*, 23 *DRAKE L. REV.* 517, 520 (1974).

298. 12 *WRIGHT & MILLER, supra* note 188, at 223.

299. *Id.*

300. See *Local Rules Comment, supra* note 240, at 1011. A curious example of "national local rules" is the proposed "Model Local Rule and Complaint in the Social Security and Black Lung Litigation." It was forwarded to all United States District Judges by the Director of the Administrative Office of the United States Courts by letter dated March 1, 1976, "at the request of the Committee on Court Administration of the Judicial Conference with a recommendation for favorable action." Apparently it was first sent to the Administrative Office by letter dated January 7, 1976, from the Office of General Counsel of the Department of Health, Education and Welfare with a letter indicating that it had been drafted by the General Counsel's office and the Department of Justice. There is no indication of publication in advance, as probably would have been required had an administrative regulation been adopted. Nor is it apparent why, if a uniform national rule were required, the ordinary procedures for amending the Federal Rules of Civil Procedure were not followed.

301. 363 U.S. 641, 649-50 (1960).

302. Adm. R. 30A, 368 U.S. 1023 (1961).

303. See *FED. R. CRIM. P.* 29.1.

Justice of the United States and a number of district judges would, by passing upon the rule, reduce somewhat their apparent impartiality should the rule come before one of them in litigation. However, the impact on any particular decision would be minimized by use of panels at the court of appeals level and the entire bench at the Supreme Court level. Furthermore, a request in any court for disqualification would undoubtedly be honored. The risk of a claim of bias by a litigant would thus be reduced to the vanishing point. Where, in contrast, the entire circuit council passes on the validity of a rule in advance, the claim of partiality may be substantial, as already demonstrated, and there may be no practicable way of dealing with it.

Effective reporting and some degree of control at the national level might result in reduction of the plethora of local rules; this would accord with the original intent of the drafters of the Federal Rules of Civil and of Criminal Procedure.³⁰⁴ The present local rules situation has been characterized by Professor Rosenberg as "a kind of procedural Tower of Babel."³⁰⁵

C. *Quasi-Rule Directives*

The United States Judicial Conference has issued a wide variety of recommendations to guide lower courts, many of them of a rule-like character. They range from disapproval of the use of a conspiracy indictment to convert joint misdemeanors into a felony, to suggestions as to which cases should receive preferences, which ones are suitable for masters, and which ones justify granting bail before or after conviction.³⁰⁶

Occasionally the directives are followed with such faithfulness that they become, in effect, rules—rules, however, lacking even customary minimal procedural safeguards. Second Circuit guidelines, for example, reducing below the statutory level the compensation available to attorneys appointed to represent indigent criminal defendants, are rigidly enforced despite the fact that they were adopted without public debate or publication and at a time when the cost of living was 40% below what it is now.³⁰⁷ Such policy-making directives may have distinct substantive overtones.

In some state courts such as those of New York, private directives from the Presiding Justice of the Appellate Division or an administrative judge control the discretion of trial judges.³⁰⁸ To the extent that these

304. See *Rule 83 Note, supra* note 232, at 1255-59.

305. *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967) (testimony of Professor M. Rosenberg on April 21, 1967), quoted in *Rule 83 Note, supra* note 232, at 1259.

306. P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 71-74 (1973).

307. See letter from Chief Judge of Second Circuit to Judge Bonsal (November 13, 1975). Cf. [1975] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 75 (Sept. 25-26, 1975) (guideline on payments under Criminal Justice Act for defendants who have some resources).

308. See, e.g., Directive, limited stays in criminal appeals (February 5, 1975); Directive,

directives and quasi-rules are not published, they create serious problems for the practicing lawyer.³⁰⁹

At the least, directives should be published, so that they can be systematically gathered, analyzed, and criticized. Ideally, the same procedures of publication and hearing before adoption should be followed as in the case of other rules.

D. Guidelines

Courts or committees may issue guidelines that differ from rules only in the informality of their adoption. The range of topics touched upon can be as broad as that covered by rules and the influence on court activities can be as pervasive. For example, the Second Circuit Judicial Council has recently recommended guidelines on sentencing for adoption by the district courts.³¹⁰ While they would have no binding effect, the impact on sentencing would be quite substantial—similar to that of a rule or statute allowing some discretion.

The Eastern District of New York has adopted an extensive list of "fines" which may be levied for various infractions, ranging from \$100 per bird for taking migratory nongame birds to \$25 for advertising on certain public lands.³¹¹ They are "guidelines" only, but they will be followed despite the fact that no notice or public hearing was provided. Even if such a guideline is ignored, an appellate court will tend to be heavily influenced by it, particularly if the court participated in the formulation.

The trend is for more supervision, not less. Numerous agencies and officials have come forward in the last few decades to assist in improving court administration. The Administrative Office of the United States Courts, for example, was established to aid in the achievement of one of the major purposes of the Act of August 7, 1939:³¹²

to furnish to the federal courts the administrative machinery for self-improvement, through which these courts [would] be able to

use of split trials "whenever possible" (January 31, 1974); Directive, avoid referrals of custody disputes to Family Court (April 4, 1974).

309. In *Mathews v. Weber*, 423 U.S. 261 (1967), for example, the Court upheld General Order No. 104-D of the Central District of California which provides for initial reference to a magistrate in certain administrative review matters. This order might well affect an attorney's trial tactics. Yet, an examination of the current Federal Rules Service purporting to contain all current local rules does not reveal this order.

310. See *N.Y. Times*, March 18, 1976, at 37, col. 3. See also Joint Comm. of the Ass'n. The New York County Lawyers' Ass'n and the Fed. Bar Council, *Federal Sentencing Practices*, 30 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 652 (1975). The proposed rules are set out in *N.Y.L.J.*, March 18, 1976, at 1, col. 3. By resolution of the Board of Judges of the Eastern District of New York, adopted February 9, 1976, those portions dealing with treatment of the presentence report were adopted (without public notice) and embodied in notices of sentencing to be mailed by the probation department. Subsequently, more extensive "sentencing standards" based upon Second Circuit proposals, but with some modifications, were adopted to guide lawyers and court personnel. *N.Y.L.J.*, Oct. 15, 1976, at 1, col. 3. No public hearings were held before adoption.

311. *E.D.N.Y. R.* 252.

312. *Chandler v. Judicial Councils*, 398 U.S. 74, 97 (1970).

scrutinize their own work and develop efficiency and promptness in the administration of justice.³¹³

The Federal Judicial Center was organized to conduct studies and make recommendations with respect to the improvement of the administration of justice.³¹⁴ These groups and others, including the circuit judicial councils and conferences, tend to share their expertise on the judicial system by issuing guidelines, drafts of rules and suggestions concerning procedure in the district and circuit courts.

This development is one that most judges interested in improving the work of the courts welcome, since it generally results in more effective justice. The impact of these guidelines on the rights of litigants and attorneys may, however, be substantial—yet attorneys and the public are usually ignorant of their promulgation and operation.

There are some signs, however, that organs of court reform are beginning to recognize the need for public participation in developing guidelines. One recent example is seen in the Federal Judicial Center's treatment of its "Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts." Its proposals were marked "Tentative." The Special Committee that drafted the report recommended that it "be circulated to every federal judge and to appropriate bar association groups and law school faculties."³¹⁵ Obviously, prisoner groups, legal aid-public defender organizations, and representatives of correctional groups such as associations of guards, should be given the opportunity to be heard. Forms for orders included in the report, and a suggestion that the report be kept with the judge's benchbook,³¹⁶ indicate that it will have an impact at least as great as many of the Federal Rules of Civil Procedure in controlling this kind of litigation.

As another example, the manual which now governs procedure in much complex and multidistrict litigation³¹⁷ was prepared by federal judges after extensive consultation with the bench, bar and law schools.³¹⁸

The recommended A.B.A. procedure for adoption of standing guidelines also provides for public participation:

313. H.R. REP. NO. 702, 76th Cong., 1st Sess. 2 (1939), cited in *Chandler v. Judicial Councils*, 398 U.S. 74, 97 (1970).

314. See 28 U.S.C. § 620 (1970).

315. Letter from Judge Ruggero J. Aldisert to United States Judges, Circuit Court Executives, and Clerks of Court (January 30, 1976). By contrast, the memorandum of the Deputy Director of the Administrative Office of the United States Courts (January 13, 1976), indicated that the "Addendum to Guidelines to the Amendments to the Federal Rules of Criminal Procedure Which Relate to the Preparation and Use of Presentence Reports" would only be sent to "United States District Judges, Magistrates, Clerks of Court, Public Defenders, and Probation Officers."

316. "The report was prepared in loose leaf form to facilitate changes and additions. This format also permits the inclusion of the report in a benchbook, thus enhancing its utility as a reference tool." Letter from Judge Ruggero J. Aldisert to United States Judges, Circuit Court Executives and Clerks of Courts (January 30, 1976).

317. FEDERAL JUDICIAL CENTER MANUAL FOR COMPLEX LITIGATION (1973).

318. *Id.* at xiv-xvi. See also note 28 *supra*.

1. The court drafts proposed guidelines.
2. The court makes the proposed guidelines public by distribution to the community and to state and local news media, news media organizations, bar organizations, law enforcement agencies, public defenders' offices, prosecutors' offices and such other interested persons as may come to the attention of the court.
3. The court solicits written comments and suggestions as to the guidelines to be submitted by a specified date.
4. The court schedules meetings between judges and interested persons for open discussion of the proposed guidelines.
5. The court then determines guidelines to be adopted.
6. The guidelines are publicly distributed and published broadly and generally in the community, including distribution to the persons described in paragraph 2, with a notice that they will be adopted absent a written objection to be filed with the court by a specified date.
7. If there are no objections filed, the court adopts the guidelines.
8. If objections to the guidelines or any portion thereof are filed, the court shall follow a procedure by which any persons could be heard and present facts and arguments as to how or whether the guidelines should be specifically modified.
9. After such proceeding, the court adopts final guidelines, stating the reasons for the adoption of the guidelines with specific reference to any guideline which was the object of controversy at the proceeding.
10. Review. It is recommended that some method of appellate review at the behest of interested persons without reference to a given case be afforded, since the guidelines are designed to be implemented outside the context of any particular case. Perhaps this could be accomplished by the same procedure and on the same grounds as review of local rules. Perhaps the appellate court as a supervisory court could be asked for approval or modification of these guidelines. Perhaps a judicial council would have the authority for a review. The method of review is left for local implementation.
11. The standing guidelines should be subjected to periodic review. Modification, either on the request of interested persons or *sua sponte* by the court, shall be considered by following the above adoption procedure.³¹⁹

While adoption of these recommendations would substantially improve present procedures for developing guidelines, two reservations may be expressed. First, it probably would be more useful, in the light of prior experience in this country, for the court to appoint an advisory committee to make initial recommendations and propose drafts, rather than drafting guidelines itself, as the A.B.A. procedure provides. Perhaps the American Bar Association Committee felt that it was acting in this capacity and, therefore, that this preliminary step was not necessary.

319. American Bar Association, Proposal, "Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press," quoted in Roney, *The Bar Answers The Challenge*, 62 A.B.A.J. 60, 64 (1976).

Second, the wisdom of requiring appellate review of guidelines is open to serious question. Such a review would compromise the reviewing court in the same way that prior review of rules does. A sufficient degree of protection would be afforded by placing the review function in the Standing Committee on Rules of the United States Judicial Conference; power could remain in the full Judicial Conference to overrule a veto by the Committee on Rules. The delay and opportunity to resort to Congress for protective legislation might lead to more thorough consideration and possible compromises without jeopardizing the impartiality of the litigation process.

E. *Individual Judge's Rules*

Rule 83 of the Federal Rules of Civil Procedure provides that district courts may adopt local rules "by action of a majority of the judges. . . ." It has been suggested that this "majority requirement . . . constitutes a narrowing of the statutory grant of rule-making power in 28 U.S.C. § 2071."³²⁰ The limitation may be "desirable insofar as it promotes greater uniformity of practice within a single district."³²¹ If this is the purpose, however, it has not always been achieved.

Particularly with the growth of individual calendars, as contrasted with general calendars, there has been a tendency for individual judges to develop their own practices. One recent study notes:

In addition to the . . . regularly reported sets of rules which govern, *inter alia*, motion practice and calendar matters in the Southern District, at least twenty-two of the twenty-four active and four sitting senior judges have special motion and or calendar rules with which counsel must be familiar. These special rules vary greatly and lead to some confusion among litigants. . . .³²²

The report suggests "a more readily available published edition of each judge's special rules and limited standardization. . . ."³²³

Practices of individual judges lie in a gray area between rulemaking and the exercise of individual discretion. Some variation here is acceptable and, perhaps, desirable since a judge may be more efficient if he or she is comfortable with the details of his or her practice. But in some instances the divergence seems unnecessarily idiosyncratic and a local rulemaking process in which the bar and law schools participated might eliminate unnecessary differences.³²⁴

320. Blair, *supra* note 297, at 518 n.6. Section 2071 of title 28 grants power to "all courts established by Act of Congress [to] prescribe rules for the conduct of their business."

321. Blair, *supra* note 297, at 518 n.6.

322. Committee on the Federal Courts, *The Association of the Bar of the City of New York, Report Evaluating the Individual Assignment System in the Southern District of New York After Three Years Experience* 5 (July 8, 1975) (mimeograph).

323. *Id.*

324. The report notes:

Ten judges require . . . papers to be filed only in the Clerk's Office; six . . . require

CONCLUSION

A. *Suggested Changes in the National Rulemaking Process*

1. Although the present division of national rulemaking authority among the United States Judicial Conference and its committees, the Supreme Court, and the President has worked fairly well, defects in the distribution of authority and the process utilized suggest that revision of the relevant statutes and practices is now desirable.

2. The Supreme Court should not adopt rules for any court except itself. Its members have little expertise in most of the areas regulated by rule, due to their lack of trial experience; and their heavy work load prevents adequate study of the issues. While the Court's involvement bestows prestige on the rules, it inhibits the Court itself and other courts from impartially construing the rules.

3. The United States Judicial Conference should take the place of the Supreme Court as the national rulemaking authority. This change would not appreciably reduce the leadership role of the Chief Justice, who serves as chairman of the Conference. If an independent body of judges rather than a court is given responsibility for the rules, courts will be free to consider the rules impartially.

4. The structure currently employed for rulemaking by the United States Judicial Conference—that of a Standing Committee on National Rules of Court Practice and Procedure, and satellite advisory committees—is sound and should be retained. With representatives of the bar, bench and law schools on the committees and with the tradition of law professor reporters, an orientation both practical and scholarly is achieved. A Standing Committee of no more than fifteen members, with staggered terms of five years, would seem desirable. Appointments should be made by the Judicial Conference—which means practically speaking by the Chief Justice with the advice of the Conference—to maintain the high status of membership.

Ex-officio memberships are not required to ensure a broad range of representation on the committees; the Chief Justice and Judicial Conference should be expected to consult on appointments with the United States Attorney General, and with such organizations as the American Bar Association, the Legal Services Corporation, the American Association of

duplicate sets to be filed in the Clerk's Office and in chambers, and one judge requires papers to be filed only in chambers. . . . Ten judges specify that oral argument is permitted only if the judge deems it appropriate; three judges permit oral argument on request of counsel, and three judges generally require oral argument on all motions.

. . . Finally, two judges require the filing of a Note of Issue or Statement of Readiness in all civil cases. Twenty judges do not have such a special rule, although most of these judges . . . do have published lists of civil cases ready for trial.

Id. at 40-42.

Law Schools and the National Legal Aid and Defender Association. The desirability of minority representation should be considered in making appointments. If Congress adopts a statute on the subject, precatory language concerning the need for broad representation on the committees would be appropriate.

Neither Congress nor the President should be represented on the Standing or advisory committees. Even the presence of congressional observers may give the senior members of Congress who designate them a disproportionate influence in rulemaking and thus impair the ability of Congress to assess proposed rules without bias.

5. The Standing Committee should widely publicize the proposals of its advisory committees and hold public hearings upon them before recommending adoption to the Judicial Conference. Where the Standing Committee's or an advisory committee's judgment has been seriously questioned, the Standing Committee should not hesitate to request relevant studies from such groups as the Federal Judicial Center, the American Bar Foundation, the American Law Institute, and law schools. Thorough airing of the issues before adoption may reduce congressional desire to review the details of proposed rules.

6. Congress should retain the power to reject any proposed rule or amendment by joint resolution within a limited period. Six months should suffice. If Congress needs more time for review or wishes to amend the rules, it should be required to employ the usual legislative procedure, with presidential participation.

7. Congress should confine its involvement to the review of substantial principles, rather than redrafting details of rules. Congress should not make changes unless they constitute clear improvements.³²⁵

8. Substantive matters (such as rules of privilege), important quasi-constitutional procedural matters (such as reduction in size of juries), or jurisdictional matters (such as appeals from sentences), should be handled by legislation and not by rules. It is appropriate for the rulemaking bodies to draft and recommend legislation so that necessary improvements do not "fall between the stools."

B. *Suggested Changes in the Local Rulemaking and Guideline-Making Process and in Rulemaking by Individual Judges*

1. No local rule for an appellate or trial court should be adopted without publishing the proposal in advance and providing for a public hearing after notice. Mere publication will not suffice; affirmative efforts

325. Congress' detailed intervention in the formulation of the Federal Rules of Evidence and the 1975 Amendments to the Federal Rules of Criminal Procedure needlessly diminished the prestige of the judiciary as a rulemaking institution; many of the congressional modifications involved no significant policy issues, but rather reflected personal predilections of individual members of Congress.

should be made to engage the bar, bench and law schools in the process. Thus, each court should utilize advisory committees that would call on cooperating representatives of the public, including lay persons.

2. To preserve national uniformity and control excessive or unwise local rulemaking, no local rule, other than a rule of the Supreme Court, should be effective until it has been reported to, and approved by, the Standing Committee on National Rules of Court Practice and Procedure.³²⁶ If the Standing Committee rejects a rule or fails to approve it within six months, the United States Judicial Conference should have the right of approval.

3. Guidelines or their equivalent, whether adopted for a court by itself or by another judicial body, should be published before they become effective. Upon objection by any person, a public hearing should be held.

4. Individual judges should eliminate, as far as possible, rules and practices which diverge from those of other judges on their court.

5. All local rules, guidelines and individual judge's rules should be made available in a current and readily usable form to the bench, bar and public.

C. *Public Access to Materials*

All documents considered in connection with a rule or guideline adopted by the United States Judicial Conference or by any court (or other judicial body) should be made available to the press and to members of the public on demand. Public hearings should be recorded and a transcript should be made similarly available. Wherever possible, a report should be prepared detailing the reasons for adopting a rule. Such a report will assist courts in interpreting the rule, and will protect against arbitrary conduct or its appearance.

D. *Initiating Change in the Rulemaking Process*

Recommendations for changes in the rulemaking process could come with propriety from any of the branches of government. Since the Judicial Conference of the United States has a duty "to carry on a continuous study of the operation and effect of the general rules of practice and procedure,"³²⁷ it would seem desirable for the Conference and its committees to suggest changes in rulemaking procedures. Congress could then act on these recommendations with the assistance of the executive branch. Should the Conference fail to come forth with proposals within a reasonable time, Congress or the President through the Attorney General should take the initiative.

326. An exception should be made to permit adoption of local rules without Committee approval where necessary to meet emergency situations. The duration of such rules should be limited to one year.

327. 28 U.S.C. § 331 (1970).

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